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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1959

No. 335

SUNRAY MID-CONTINENT OIL CO., PETITIONER,

vs.

FEDERAL POWER COMMISSION.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 22, 1959
CERTIORARI GRANTED NOVEMBER 9, 1959

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[fol. 1]

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 5968

SUNRAY MID-CONTINENT OIL COMPANY, Petitioner,

vs.

FEDERAL POWER COMMISSION, Respondent.

PETITION FOR REVIEW AND MODIFICATION OF ORDER OF THE FEDERAL POWER COMMISSION—Filed August 19, 1958

To: The Honorable Judges Of The United States Court Of Appeals For The Tenth Circuit

Comes now Sunray Mid-Continent Oil Company, Petitioner, and prays this Honorable Court to review the order of the Federal Power Commission,[1] in so far as it applies to Petitioner, adopted in "In the Matter of Sunray Mid-Continent Oil Company, et al.," Docket Numbers G-12211, et al., on May 9, 1958, and to modify said order as more specifically prayed hereinafter.

Venue

Petitioner is a corporation organized under the laws of Delaware, with its principal place of business located in Tulsa, Oklahoma, which is within this circuit, and files this petition with this Court pursuant to Section 19 (b) of the Natural Gas Act, as amended[2] (15 U.S.C. § 717 r(b)). Petitioner, within thirty days of the issuance of said order, filed an Application for Rehearing with the Commission in which the objections to said order here urged were raised. That application was denied by an order of the Commission adopted June 21, 1958, and this petition is filed in this Court within sixty days after such denial by the Commission.

[1] Hereinafter referred to as the "Commission."

[2] Hereinafter referred to as the "Act."

Nature Of Proceedings As To Which Review Is Sought

On March 11, 1957, Petitioner, an independent producer [fol. 2] of natural gas, filed an application for a certificate of public convenience and necessity pursuant to provisions of Section 7 (c) of the Act for permission to sell gas to United Gas Pipe Line Company ("United") from the Ridge Area, in Lafayette and Vermilion Parishes, Louisiana. Applications were also filed by Buffalo Oil Company ("Buffalo") and Warren Petroleum Corporation ("Warren"), also independent producers, to sell gas to United from the same field. United filed an application for permission to construct facilities necessary to pick up the gas which would be delivered to it by the three producers.

In its application for certificate, the Petitioner specifically proposed:

"That the Commission issue to it a certificate of public convenience and necessity authorizing the sale of gas covered by the contract described hereinabove . . . *to the extent, and only to the extent, that such gas is transported in interstate commerce for resale for the remainder of the term of said contract and as it may be renewed or extended, and that said certificate provide for its own expiration on the expiration of said contract term so as to authorize Applicant to cease the delivery and sale of gas thereunder at that time* . . ." (Emphasis supplied.)

The referenced contract is that of January 1, 1957, providing for a sale to United of gas produced from the lands, leaseholds and units, or parts thereof, now owned by seller in an area of approximately 33 square miles in both Lafayette and Vermilion Parishes, Louisiana, in which at this time the only proven gas reserves are located in what is denominated the "Ridge Field," in Lafayette Parish, Louisiana. The contract provides for the sale of gas only for a 20-year term, with the proviso that, if buyer is unable to take delivery of the quantity of gas specified as sold hereunder in the 20-year term by reason of the gas being required for cycling, repressuring or pressure maintenance operations, the term shall be extended for a period of time

sufficient for buyer to be able to take delivery of the additional gas so that buyer will receive the full contract quantity. The contract quantity is based on the proven gas reserves. The contract recognizes that additional reserves may be discovered in the 33-square mile area and, with certain conditions precedent, provides for the inclusion under the terms of this contract of such additional gas reserves. On the redetermination (enlargement) of the proven gas reserves for the purposes of the contract quan-[fol. 3] tity, however, no retroactive effect is given to the newly discovered or added reserves. The contract quantity is fixed at 4.5625% per year of seller's gas reserves.

These applications, pursuant to a notice by the Secretary of the Commission, were set to be heard in a consolidated hearing. This public hearing was held in Washington, D. C., on October 15, 16 and 17, 1957.

Although Staff Counsel took no position at the hearing concerning the fact that Petitioner's application proposed a sale of gas to United only for a period of time which would be co-extensive with that set forth in its contract with United, Staff Counsel, in its brief to the Examiner, opposed the issuance of a certificate which would grant such authorization on the ground that Petitioner had failed to sustain its burden of proof and affirmatively recommended the issuance of what it termed an "unlimited" certificate—presumably one which would not expire at the date of expiration of the contract, a pre-determinable date.

At the end of the hearing, appropriate briefs were submitted to the Presiding Examiner who, on February 3, 1958, rendered his decision. The Examiner denied Petitioner's request that the certificate issued to it be co-extensive with the term of its contract with United. Petitioner filed exceptions to the Presiding Examiner's decision with the Commission on February 24, 1958.

On May 9, 1958, the Commission issued an order (to which this petition is addressed) entitled "Order Modifying and Affirming Initial Decision of Presiding Examiner." This order modified in certain respects not here in issue the Examiner's decision and affirmed the Examiner's decision as correct, adding that Section 7 (e) of the Act permits the conditioning of a certificate and that the Commission must be able "to prevent abandonment" (sic). The

order, a copy of which is attached hereto, also added that the burden of supporting a limitation of term in a certificate is upon the applicant and that the Commission is only authorizing a part of the proposal because applicant has failed to sustain its proposal in its entirety. Your petitioner on May 29, 1958, filed its application for rehearing and reconsideration of the Commission's order of May 9, 1958, which was denied by the Commission on June 21, 1958.

[fol. 4] Grounds On Which Relief Is Sought

The grounds upon which relief is sought are as follows:

A. The Commission is without authority to issue a certificate to an applicant authorizing more than the whole or some part of the sale covered by the application for certificate of public convenience and necessity and the Commission erred as a matter of law in so doing herein.

Section 7 (e) of the Act requires that the Commission issue a certificate to this Petitioner authorizing "the whole or any part" of the sale covered by the application if the Commission finds that Petitioner is able and willing properly and legally to perform the sale proposed and that the sale proposed, "to the extent authorized by the certificate," is or will be required by the present or future public convenience and necessity. If the Commission does not do this, the section provides that the application shall be denied. The Commission by the section is also given the power to attach conditions to the certificate if the conditions are reasonable and are required by the public convenience and necessity.

In the instant case, the Commission has issued a certificate which would require the applicant to sell a larger quantity of gas than applicant is obligated to sell under its contract with purchaser and a larger quantity of gas than applicant has applied for authority to sell. Additionally, the Commission has issued a certificate which would require the applicant to sell gas for a longer period of time than the period for which applicant has obligated itself by contract to sell gas and for a longer period of time than applicant has requested be certified for such sale.

Since the only authority that the Commission has for the issuance of a certificate in the instant case is that contained

in Section 7 (e), the Commission has exceeded its authority under the Act and its order issuing said certificate is in error as a matter of law.

B. The Commission erred as a matter of law in conditioning the certificate applied for so as to require enlargement of the investment of the capital assets of applicant over that proposed by applicant and that required by the [fol. 5] applicant's contract for sale of gas.

The Petitioner applied for a certificate to sell the contract annual quantity of gas for only a 20-year period. The certificate issued by the Commission's order is one which would require the Petitioner to sell the annual contract quantity of gas for more than 20 years and, thus, it would require Petitioner to sell more of its gas than Petitioner proposed to sell. Therefore, the Commission's order would require Petitioner, as a condition precedent to selling gas in interstate commerce, to give up control of the capital assets of the company which are not the subject of the contract which is the basis of the sale in interstate commerce and which capital assets Petitioner has not offered before the Commission for sale in interstate commerce. This, we submit, the Commission is as much without authority to do as to require an applicant, on pain of not receiving a certificate as applied for, to enlarge his physical facilities beyond those which the management of applicant has determined to devote to use in interstate commerce. In the Matter of Panhandle Eastern Pipe Line Co., et al., 15 F.P.C. 46 (1956) and Central West Utility Co. v. Federal Power Commission, 247 F. 2d 306 (U. S. Court of Appeals, 3d, 1957).

C. The Commission erred as a matter of law in conditioning the certificate issued to applicant in the absence of any evidence or findings that the public convenience and necessity may so require.

While Petitioner only applied for and proposed a sale of the contract quantity of gas for a 20-year period, the Commission has issued a certificate to the Petitioner for a sale of more than the contract quantity of gas and for a period of more than 20 years. Since this change in the proposal of Petitioner was not instigated by Petitioner,

the change must be denominated a condition to the certificate. Under the last sentence of Section 7 (e) of the Act, the authority of the Commission to condition a certificate is limited to a condition while the Commission finds may be required by the present or future public convenience and necessity.

There is no finding made by the Commission that the public convenience and necessity requires the certificate proposed be conditioned as it has been in the issuing order of May 9, 1958.

[fol. 6] In addition, it is fundamental that such a finding, which imposes a condition, must be based on substantial evidence.

There was no evidence of any kind offered in this consolidated hearing that the present or future public convenience and necessity might require a sale of more gas or a sale for a longer period than that proposed by Petitioner in its application.

Therefore, the Commission erred as a matter of law in so conditioning the certificate issued to Petitioner.

D. The Commission erred as a matter of law in requiring that applicant for a certificate of public convenience and necessity in a hearing under Section 7 (e) of the Natural Gas Act affirmatively bear a negative burden of proof: That is, that the public convenience and necessity will not require the conditioning of the certificate applied for by that applicant.

The certificate issued to this Petitioner by the Commission authorizes the sale of the quantity of gas and for the period of time that Petitioner proposes and, in addition, it also offers and requires a sale of additional gas and for an additional period of time than that proposed by Petitioner. The whole must include all of its parts. Therefore, the Commission cannot take the position that there has been a failure by applicant to bear the burden of proof necessary under Section 7 (e) of the Act to support a certificate to sell the annual contract quantity of gas for 20 years.

However, the order of the Commission issuing the certificate states that:

"The burden to support a limitation of term in a certificate is upon the applicant."

The order of the Commission would decree upon Petitioner a burden of proving, in this case, that specifically no other or additional sale of gas is or will be required by the present or future public convenience and necessity. Specifically, here, it would place upon Petitioner the burden of proving that *no sale of more gas* than Petitioner proposes to sell is or will be in the public convenience and necessity or that *no sale* of the contract quantity of gas *for more than 20 years* is or will be required by the present [fol. 7] or future public convenience and necessity. The imposition of such a negative burden of proof on Petitioner is erroneous as a matter of law because it is in violation of both the Natural Gas Act and of Section 7 (c) of the Administrative Procedure Act.

E. The Commission erred as a matter of law in finding or holding that a certificate to sell a larger quantity of gas and over a longer period of time than that contracted for by applicant and proposed by applicant is less than that which applicant has contracted with its purchaser and proposed to the Commission.

The order of the Commission at mimeograph page 3, after reciting that the Commission must be able "to prevent abandonment" (sic), recites:

"In addition, Section 7 (e) empowers us to authorize 'the whole or any part' of the operation, sale, service, etc., covered by the application. Where, as here, the applicant has failed to sustain its proposals in their entirety, we may properly authorize only the proposals sustainable under the facts and the law."

The certificate issued by the May 9, 1958, order of the Commission is for a sale of more than the whole of the sale which was proposed by the Petitioner. Unqualified acceptance of the certificate offered would place beyond the control of Petitioner the gas reserves in the 33-square mile area, which are in excess of the contract quantity of gas. Petitioner submits that the Commission erred as a matter of law in finding or holding that a certificate to sell a larger quantity of gas and over a longer period of time than that

contracted for and proposed by applicant is less than that which applicant has contracted with its purchaser and proposed to the Commission.

F. The Commission erred as a matter of law in finding and holding that the evidence does not substantially support the issuance of the certificate proposed by Petitioner in its application.

If the Commission can issue a certificate for a sale of more gas for a longer period of time than that proposed by Petitioner, it must follow that there is evidence to support a sale of a lesser quantity of gas for a lesser period of time, as was proposed by Petitioner.

[fol. 8] The evidence in this consolidated proceeding constitutes full, adequate and substantial evidence that the present and future public convenience and necessity requires the whole of the sale which Petitioner has proposed and for which Petitioner prayed a certificate be issued. The Commission erred as a matter of law in finding or holding that the evidence does not substantially support the issuance of the certificate proposed by Petitioner in its application.

G. The Commission erred as a matter of law in finding (if any was inferentially made) and holding that the evidence substantially supports the issuance of the certificate as conditioned.

Petitioner submits that there was no finding made by either the Presiding Examiner or the Commission that the public convenience and necessity requires the certificate to be conditioned, or, that the public convenience and necessity requires the certificate to be issued without time limitation. The Examiner found, without evidence, that the public convenience and necessity did not permit the issuance of a certificate limited in duration. The Commission affirmed this holding.

The evidence offered in support of the application of Petitioner was uncontroverted. Specifically, there was no evidence offered by any party, including Petitioner, that any other sale by Petitioner was in the public convenience and necessity or that a sale of more gas by Petitioner was in the public convenience and necessity or that a sale of

the annual contract quantity of gas for more than 20 years was in the public convenience and necessity.

Therefore, the only evidence on which the Commission can base its finding is the evidence which supports only a finding that a certificate should be granted for the contract quantity and term as proposed by Petitioner. There is *no* evidence here which supports the issuance of a conditioned certificate as issued by the order of the Commission which is the subject of this petition for rehearing.

Petitioner Is An Aggrieved Party

Petitioner is aggrieved by the order of the Commission, dated May 9, 1958, in that Petitioner, having met all of the requirements of Section 7 (e) of the Act, is entitled, as a [fol. 9] matter of law, to a certificate authorizing the proposed sale of gas pursuant to the Act. The imposition of the condition, which is beyond the power of the Commission to impose, denies to Petitioner the right to sell its gas under said Act, and would require it if it did so sell to surrender fundamental rights under the Act. By selling gas under the illegal condition, the Commission would require Petitioner to continue selling gas to the purchaser without regard to the term of its contract with that purchaser, United. Delivery of gas under the certificate, subject to the illegal condition, would place a burden upon Petitioner of obtaining Commission approval under Section 7 (b) of the Act in order to terminate deliveries of gas to the buyer after all terms of the contract had been fully satisfied. Such a burden is not required by the Act, and is in fact in contravention of it. Delivery of gas under the certificate issued by the Commission would effectively transfer the matter of decision as to the future utilization and disposition of the natural gas in question from the Petitioner to the Commission. Such natural gas is a capital asset of the Petitioner which Petitioner has not contracted to sell purchaser and which purchaser has not negotiated to purchase or agreed to purchase from Petitioner.

For the foregoing reasons, among others, the Petitioner is aggrieved by said order.

Relief Sought

Petitioner prays this Court to modify the order of the Commission adopted May 9, 1958, in so far as it applies to Petitioner and denies Petitioner a certificate limited in duration and providing for its own expiration upon the expiration of the contract term on the grounds that in issuing said order the Commission exceeded its authority under the Natural Gas Act and the Administrative Procedure Act, and further Petitioner prays this Court to direct the Commission to issue a certificate of public convenience and necessity in accordance with the sale proposed by applicant and the findings made thereon by the Commission, as is required by Section 7 (e) of the Natural Gas Act.

Respectfully submitted,

James C. Denton, Jr., M. Darwin Kirk, Sunray Mid-Continent Oil Company, P. O. Box 2039, Tulsa 2, Oklahoma.

Dale E. Doty, 1028 Connecticut Avenue, N.W., Washington 6, D.C.

Filed Aug. 19, 1958.

[fol. 10]

BEFORE THE FEDERAL POWER COMMISSION

In the Matter of

SUNRAY MID-CONTINENT OIL COMPANY
Docket No. G-12211

Upon Applications For Certificates Of Public Convenience And Necessity

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Transcript of Hearing, October 15, 1957.

* * * * * * *

Testimony of Witness Ring.

* * * * * * *

The Witness: * * *

In summary, the combined recoverable gas reserves estimates attributable to the United Gas contract are stated as follows:

For the Ridge Field 105,626 billion feet, for North Leroy Field, 17,511 billion cubic feet, or a total of 123,337 billion feet, all at 14.73 Psia and 80 degrees Fahrenheit.

By Mr. Woods:

Q. Mr. Ring, may further development of the Ridge and Leroy fields be expected?

A. Yes, it may, as to both the Ridge and Leroy Fields, each of which is in a relatively early stage of development, it is to be expected that additional wells will be drilled first to delineate the full areal extent of gas production not known presently and, secondly, to increase gas deliverability from the presently known reserves as well as from additional gas reserves that may be found from extensive drilling.

Mr. Woods: Mr. Examiner, that concludes the direct examination of this witness.

* * * * * * *

[fol. 11] Presiding Examiner: But you made an independent appraisal or estimate of the reserves underlying the Ridge field?

The Witness: We had that appraisal made during the time we were discussing the contracts. We had the appraisal before we made the final deal.

Presiding Examiner: By your own forces?

The Witness: By our own geological force. What attracted us about the Ridge gas was the fact that we got a tremendous area. In fact, it is one of the largest areal contracts that we have. Our contract covers some seven thousand acres, and it is very seldom that you find a contract where a dedication is made by a producer to a pipe line company of acreage to that extent, and therefore we concluded that we needed the Ridge gas, we had to have the Ridge gas and therefore we arrived at working out with the producer the starting price of 20.5 cents. We couldn't have bought it any cheaper than that.

Presiding Examiner: Your application here covers only pipe line extending from the Ridge field up to the main line. It does not include any pipe line from Ridge to North Leroy. How far would that distance be?

The Witness: That is another three miles. Our contract, Mr. Examiner, covered a very large area, and we worked out where we would lay to each field discovered in that area, since it was a very large area, to give us better control in each field. So under the terms of the contract we will lay to Ridge field, if any new field is discovered in the field covered by our dedication, we will lay to that but it will be only a very minor extension because they are all fairly close to our line.

Sunray brought up that point and we thought it was a very good point. The acreage was spread, and the chances are there may be two or three fields covered by this contract before too long and we hope it is, and if there are additional fields and we are obligated to lay a short extension and put in a meter station for each separate field.

* * * * * * *

[fol. 12] By Mr. Geneau:

Q. Now, in this connection, I understand in the contracts there must be agreement between United and the producers as to the volume of reserves in the dedicated acreage, if I recall correctly. Has any figure been agreed upon or is any figure accepted in this connection, Mr. Ring's or United's, or—

Mr. Woods: That question, Mr. Examiner, ought properly to be addressed to Mr. Barnett. However, if I may—

Mr. Geneau: Certainly.

Mr. Woods: I would be glad to state that it is a fact that no figure on reserves has as yet been determined and that that figure will be determined at the time deliveries began.

* * * * * * *

Testimony of Mr. McCarroll.

* * * * * * *

Q. Directing your attention Mr. McCarroll, to a contract which has been admitted in evidence here as, I believe Item —excuse me, Mr. Examiner; I am trying to get the Sunray items—B, by reference, with items C and D thereof, as letters, are you familiar, sir, with that contract identified as Item B by reference?

A. Might I see that exhibit. I haven't seen it.

Q. That is by reference. It is, Mr. Examiner, for his convenience, the contract which is involved here, the sale between Sunray and United.

A. Yes, sir,

Q. Did you participate, sir, in the negotiation of that contract?

A. Yes, I did.

Q. Directly or in supervisory capacity, or both?

A. Entirely directly.

Q. Would you please tell us your first contact in connection with the sale or inquiry concerning the sale of the gas that is included in this contract with Mr. Barnett?

A. To the best of my recollection, the first time this gas or gas in this area was discussed with United was the result of a visit made to United's office in Shreveport on some other matter which was shortly after the first well in

what is now called the Ridge Field was completed and was [fol. 13] completed as a gas producer.

We had general conversation, if you will, about the prospects for gas in the area, and there was no serious negotiations of any kind conducted at that time.

Sunray's position then was that they only have the one well, they have a substantial blockage of acreage in the area, "We are not ready to talk seriously with anyone on selling this gas."

Q. Do you know of any relationship between your company, Sunray Mid-Continent Oil Company, and United Gas whereby United Gas or any of its officers assert any control over the policy of Sunray Mid-Continent Oil Company in connection with gas sales or any other matter?

A. There is none.

Q. Is there any person who is a common director on both companies?

A. No, sir.

Q. You have in your capacity as manager of gas sales no obligation, then, or no relationship with United whereby your duty to Sunray Mid-Continent Oil Company would in any way be prejudiced in favor of United Gas?

A. My only obligation is to Sunray Mid-Continent Oil Company.

Q. Now in conducting the negotiations with Mr. Barnett, was it your aim to make the most advantageous deal possible for Sunray Mid-Continent Oil Company?

A. Yes, it was.

Q. In addition to it being your aim, did you act at all times in order to fulfill that aim?

A. To the best of my capacity.

Q. I see.

I take it you have never received anything from anyone in United Gas which would cause you to swerve from that aim or that function of representing Sunray?

A. None whatever.

Q. In your opinion, is this contract which is identified as Item B by reference the best possible contract you could make for the sale of the gas that is sold thereunder?

A. Yes. As a practical matter, that was my feeling at the time the contract was entered and it was recommended to my management for acceptance.

Q. Now, Mr. McCarroll, are you familiar with the application filed by Sunray Mid-Continent in this Docket, No. 12211?

A. Yes.

[fol. 14] Q. Does Sunray propose therein to make a sale of gas to United Pipe Line Company only for the term of the contract of sale we refer to as Item B by reference?

A. Yes.

Q. Does that application specifically seek a certificate of public convenience and necessity, the term of which will be co-extensive with the term of that contract?

A. Yes.

Q. Will you tell us, please, the reason or reasons Sunray is seeking such a certificate?

A. Yes. Because that is the basis under which we contracted for this sale.

Q. Now what is the importance to Sunray that it receive a certificate which will authorize the sale of gas only for the period of time provided for in the contract?

A. There are a number of factors which enter into the making of a gas sales contract, all of which are inter-related and taken together constitute the deal which is arrived at through negotiations between buyer and seller. When we agree upon a contract, we have attempted to balance all of the various factors which are germane thereto with each other to determine the overall obligation of and benefit to Sunray under that contract. The term is one of those factors.

It is, in Sunray's opinion unreasonable to expect it to accept a certificate which, in effect, replaces the term agreed upon with one of indefinite or unlimited duration without adequately compensating for the effect of such change by varying other conditions and obligations of that contract.

Q. You stated a while ago that you were in a position to know the policy of Sunray concerning their gas sales. Could you tell us, please does Sunray have a policy with regard to the term or period at the time of a gas sales contract and, if so what is that policy?

A. Yes. Sunray does have such a policy. This company's management in the exercise of its best business judgment has adopted one.

This policy, simply stated, is that in order properly and adequately to protect the interests of its stockholders, it should endeavor to obtain the maximum control and disposition of the increasingly important segment of its assets.

In our management's opinion, therefore, the term of the contract is one of the most important factors to be considered in the negotiation of our contracts, for it is only [fol. 15] by insistence upon as short a term of contract as possible under the circumstances that this policy can be effectuated. Absolute fulfillment of this policy, of course, would require that our gas be sold on a day-to-day basis. However, the practical aspects of the business as they generally exist today prevent one from attaining such absolute.

We know that we must agree to sell our gas for periods longer than one day. The extent, therefore, to which we will agree in any particular negotiation to an extended term of obligation to sell our gas becomes one of considered judgment in the light of other factors which affect the whole of the proposed deal.

Our policy of retaining the maximum control over the disposition of this valuable asset of the company by the additional means of short-term contracts is determined by the inability to predict accurately the effect of such factors as supply and demand, the general economy of the country or the possible uses to which this asset may be put as well as many other factors which influence contract negotiation.

Consequently, we believe that the term of the contract must be as short as practicable. A term of twenty years is the maximum practical limit which Sunray's management is willing to accept unless it finds itself in a position of duress in regard to finding a market for certain of its gas reserves such as would result from loss of gas through drainage or loss of leasehold interest through failure to market gas in the face of a severely restricted market outlet.

Q. Specifically, Mr. McCarroll, in the case of the sale of the gas in the Ridge Area, that is, the gas involved here, what specifically is Sunray's objection to a period in excess of that contained in the contract?

A. The contract entered into for the Ridge Area contains a commitment by Sunray for the period of the con-

tract of not only presently known gas reserves but also other gas reserves that might be found as a result of future exploration under Sunray leases.

The contract area covers approximately 36 sections of land. There is no limitation in depth in connection with this contractual commitment. Presently proved reserves lie within only three of these sections and are found at a [fol. 16] maximum depth of approximately 12,000 feet. This, of course, means that there remains a large area for additional exploration in the contract area, both laterally and vertically. The leases committed lie within an area of high probably potential for discovery of other significant gas reserves. Continuing technological advances in drilling can also reasonably be expected to subsequently result in substantially deeper drilling in search for additional gas.

Even though additional reserves may be subsequently proved through substantially deeper drilling, it is not inconceivable that it may prove to be uneconomical to develop such reserves should our market be forever limited to this particular contract.

However, Sunray's management has agreed, as evidenced by its execution of the contract with United, to commit to such contract its gas reserves in this area, both known and unknown, for the period set out therein in consideration of the other terms and provisions. However, by so limiting the term of the contract, we have sought to insure that there will not be an uneconomical disposition of our assets.

Q. Mr. McCarroll, therefore, the term of the contract is a very important element of your negotiation?

A. We feel that it is, yes, sir.

Q. And the other factors which are of importance are the quantity of gas dedicated?

A. Yes. That has a bearing on it.

Q. Price is an important consideration, is it not?

A. Certainly.

Q. All of these elements, these three that I have named, plus whatever additional ones that there might be are interrelated, is that not true?

A. That is true in the overall performance under the contract.

Q. So that if having made a contract for a term of years, that particular term of years is set aside or extended or changed from that which was agreed upon, would you consider that a change in the contract which would not have been consistent with those other provisions which have been agreed upon?

A. In most cases, yes.

Q. Would you in this case?

A. Definitely in this case.

* * * * * * *

[fol. 17] Cross examination.

By Mr. Geneau:

Q. Am I correct, Mr. McCarroll, when I say that Sunray in seeking a limited certificate is not seeking to sell gas for an exact period of 20 years?

* * * * * * *

The Witness: Yes; I think the answer to that would be yes, we are not seeking that. We are seeking a certificate co-existent with the term of that contract.

By Mr. Geneau:

Q. And that under the provisions of this contract and the provision concerning term as set out in Article 14 which also relates to Article 2, I gather that, generally, after the twenty-year period if Sunray has during that period not delivered because itself it has used the gas for cycling that the contract is to be extended as a make-up period?

A. For a sufficient period of time to permit United to receive the gas they were prevented from receiving during the time we were receiving it under those reservations in Article 2.

Q. So that the shortest possible term under this contract is 20 years?

A. I don't agree with that.

Q. Within the ability to perform. I have included a lot of assumptions in that question.

A. If there is no more gas found than is initially in the

set-up of this contract when United elects to produce it at the maximum rate, there will be no more gas for 16 years.

Q. Whereas if cycling, say, is undertaken, the contract period can extend considerably longer than 20 years?

A. Well, that would depend on the degree and extent of cycling.

Q. So there is no way at the present time of determining just how much longer than 20 years the term of this contract could be extended under its terms?

A. There is not.

. . . . . .

Q. Could you explain to me Mr. McCarroll, outside of United Gas Pipe Line Company and outside of Sunray Mid-[fol. 18] Continent as contracting parties, just how is the public benefited or how it is in the public convenience and necessity for the Commission, say, to authorize or issue a limited certificate which would be co-extensive under terms of this contract, in other words, from the public point of view, from the broad point as viewed not having to do with the individual parties involved?

Mr. Scott: Mr. Examiner, I am not sure that that is a question that this witness is qualified to answer. I am not sure that anyone is qualified to answer that except perhaps the Commission itself.

Presiding Examiner: Well, I think that is probably true but if the witness wants to undertake it, I think he should be permitted to.

By Mr. Geneau:

Q. You see what I am suggesting, Mr. McCarroll—

Mr. Scott: Mr. Examiner, may I then get somebody else on to give his opinion as to why the public is benefited?

Presiding Examiner: No. You propose here that this certificate be limited. I think you should be permitted an opportunity to explain why it should be and, of course, it depends basically on the question of public convenience and necessity.

Mr. Scott: Yes, sir, that is true. That is a conclusion, sir.

Presiding Examiner: Certainly it would not—If you want to object to the question, I will sustain the objection.

Mr. Scott: Yes. I don't think Mr. McCarroll is in a position to answer that, sir.

BEFORE THE FEDERAL POWER COMMISSION

APPLICATION OF SUNRAY MID-CONTINENT OIL COMPANY FOR CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY UNDER NATURAL GAS ACT FOR SALE OF GAS

Sunray Contract No.: C-7392 Date Of Contract: January 1, 1957 Purchaser: United Gas Pipe Line Company Fields: Ridge Area Location: Lafayette and Vermilion Parishes, Louisiana

[fol. 19] Comes Now Sunray Mid-Continent Oil Company and makes application, pursuant to and in accordance with the provisions of Order No. 174-B, issued by the Federal Power Commission on December 17, 1954, in Docket No. R-138, and Section 7 of the Natural Gas Act, as amended, for a Certificate of Public Convenience and Necessity covering the sale of natural gas as hereinafter particularly described and for such purpose does represent to the Federal Power Commission, as follows:

1. Description Of Applicant
(Section 157.24(a)(1))

The exact legal name of this Applicant is Sunray Mid-Continent Oil Company, being a corporation organized under the laws of the State of Delaware with its principal place of business in Tulsa, Oklahoma. This Applicant is authorized to do business in the States of Alabama, Arkansas, California, Colorado, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Wisconsin and Wyoming.

2. Predecessor
(Section 157.24(a)(2))

This Applicant had no predecessor in interest bona fide engaged in the sale of natural gas subject to the jurisdiction of the Commission on June 7, 1954.

3. Person For Service
(Section 157.24(a)(3))

The persons to whom correspondence, or communications, including service of all notices and orders by the Commission, in regard to this application are to be addressed are:

Name: James C. Denton, Jr.
Title: Attorney
Post Office Address:
P.O. Box 2039
Tulsa, Oklahoma

Name: C. F. McCarroll
Title: Manager, Gas Sales
Post Office Address:
P. O. Box 2039
Tulsa, Oklahoma

[fol. 20] Communities And Main Line Industrial Customers Served
(Sections 157.24 (a)(4)(iii) and (iv))

Applicant was not serving or selling natural gas on June 7, 1954, to any communities or to any main line industrial customers nor does Applicant propose any such service or sales.

5. Sale To Be Certified
(Section 157.24(a)(4))

Pursuant to the terms of its contract with United Gas Pipe Line Company (Purchaser), Applicant proposes to sell to Purchaser its undivided interest in gas to be produced from lands and leaseholds now owned by Applicant and located within a specified area of Lafayette and Vermilion Parishes, Louisiana, as such lands and leaseholds and area are more fully set out in such contract. Said contract is that certain contract described on the cover page hereof and a copy is attached hereto as Exhibit "B". Applicant is informed and therefore alleges that Purchaser will transport this gas in interstate commerce. Applicant has no other information as to the disposition of this gas by Purchaser.

6. Sources Of Gas
(Section 157.24(a)(4)(i))

The source of gas to be sold by Applicant to Purchaser hereunder is from Applicant's interest in lands and leaseholds located within a specified area of Lafayette and Vermilion Parishes, Louisiana, which lands and leaseholds

and area are more particularly described in the subject contract affixed hereto as Exhibit "B" to this application. The delivery point for said gas is to be in the Ridge Field at a point to be mutually agreed upon by Applicant and Purchaser, and at a mutually agreeable point in each additional field, which is discovered or developed in which lands covered by the subject contract are located. Exhibit "A", attached hereto, is a plat showing the geographical location of the area within which Applicant's lands and leaseholds covered by the subject contract are located, as well as showing the outline of Ridge Field.

7. Major Appurtenances
(Section 157.24(a)(4)(v))

No major appurtenances are now contemplated by Applicant.

[fol. 21]

8. Exhibits
(Section 157.25)

Applicant is filing this application on its own behalf and not as a representative. Reference is made to Exhibits "A" (map) and "B" (contract) attached hereto for all purposes herein.

9. Notice Of Application

Notice of this application has been given by the service of a true copy of the application (without the exhibits provided for in Section 157.25) upon the Purchaser and upon the State Regulatory Commission having authority over such sale in the state shown on the cover sheet hereof.

10. Any and all acts, Facilities and operation prior to and preceding the delivery of gas for the sale covered hereby is exempt from regulation by the Commission under the Natural Gas Act.

11. By the filing of this application and the exhibits thereto, including the installations, facilities and operations portrayed on the map or maps attached thereto, Applicant is attempting in good faith to comply with the requirements of Order No. 174, as amended by Orders No. 174-A and No. 174-B, of this Commission. However, this

application is filed under protest for the reasons that: This Applicant was given no notice of the consideration, formation or issuance of such order; this order, and its issuance, exceeds the authority of the Commission; and Applicant is unable to determine with any degree of certainty the applicability of the order to itself and its sales and/or facilities and/or operations or the manner in which the same is intended by the Commission to so apply to Applicant, its sales and/or facilities and/or operations. Accordingly, this application is made without prejudice to the right of Applicant to contest the validity of the said order or any part thereof as to Applicant or any of its sales, facilities or operations in any *forum* available in the premises, and nothing herein contained is intended, nor shall be construed, to waive any such rights of Applicant nor to deprive this Applicant of its right to rely on any judicial determination thereon to which Applicant may not have been a party but which otherwise would be applicable to this Applicant, its sales, facilities or operations.

[fol. 22] 12. Applicant is able and willing properly to make the sale in accordance with the terms, provisions and conditions of its contract and in connection therewith to conform to the provisions of the Natural Gas Act and the requirements, rules and regulations of the Commission thereunder, if Applicant is held subject thereto.

13. The public convenience and necessity will be served by the granting of this application.

Wherefore, Applicant prays:

(1) That the Commission enter an order that the sale of gas described hereinabove is not within the jurisdiction of the Commission under the Natural Gas Act and that by such sale Applicant is not made a natural gas company within the meaning of said Act; or, in the alternative

(2) That the Commission issue to it a Certificate of Public Convenience and Necessity authorizing the sale of gas covered by the contract described hereinabove and on the cover sheet hereof to the extent, and only to the extent, that such gas is transported in interstate commerce for

resale for the remainder of the term of said contract and as it may be renewed or extended, and that said certificate provide for its own expiration on the expiration of the said contract term so as to authorize Applicant to cease the delivery and sale of gas thereunder at that time; and

(3) Such other and further relief as appears warranted in the premises.

Dated Mar 8 1957

Sunray Mid-Continent Oil Company, By James C. Denton, Jr., Its Attorney.

[fol. 23]

EXHIBIT B TO APPLICATION

Gas Purchase Contract
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[fol. 24] Gas Purchase Contract

This Contract, Made and entered into as of the 1st day of January, 1957, by and between Sunray Mid-Continent Oil Company, a Delaware corporation, hereinafter designated as "Seller," and United Gas Pipe Company, a Delaware corporation, hereinafter designated as "Buyer;" Witnesseth:

Whereas, Seller is the owner of certain lands and leaseholds in the hereinafter described area in Lafayette and Vermilion Parishes, Louisiana, and has, or will have, a supply of gas available for sale which will be produced from such lands and leaseholds; and

Whereas, Buyer operates a gas pipe line system serving various markets and Buyer desires to purchase gas from Seller to supply a portion of Buyer's gas requirements;

Now, Therefore, in consideration of the premises and of the mutual covenants and agreements herein contained, the parties hereto covenant and agree, as follows:

I. Subject to all the terms, conditions and limitations hereinafter set forth, Seller hereby sells, and agrees to sell and deliver, to Buyer, and Buyer agrees to purchase and receive from Seller, in the usual conduct of Buyer's business at the hereinafter described delivery points, merchantable gas in the quantities hereinafter set forth produced from the lands and leaseholds covered hereby; subject, however, to the reservation by Seller of sufficient gas for:

(1) A. The development and operation of the leaseholds and units of Seller which, in whole or in part, are covered hereby, including gas used for lease fuel, gas lift, cycling, secondary recovery operations, repressuring or pressure maintenance of oil producing horizons and any other gas injection operations that may be conducted for the purpose of increasing hydrocarbon recovery;

B. For fuel for drilling operations on the leaseholds and units of Seller located in the general area of the area covered hereby;

[fol. 25] (2) The operation of any separation equipment and of any gasoline or other extraction plant or compressor station which handles the gas of Seller;

(3) The supplying to Seller's lessors of gas to which such lessors are entitled under the terms of Seller's leaseholds covered hereby, including, but not by way of limitation, any royalty gas which any of Seller's lessors may be entitled to take in kind; and

(4) The fuel requirements of Seller's production camp, offices and warehouses located on, or in the general area of, the leaseholds and units covered hereby, so long as such camp, offices and warehouses are serving, in whole or in part, the leaseholds and units covered hereby.

This contract shall cover all lands, leaseholds and units, or parts thereof, now owned by Seller, including Seller's interest in lands, leaseholds and units owned in common with others, which are located within the area in Lafayette and Vermilion Parishes, Louisiana, outlined in black on the map attached hereto as Exhibit "A" and made a part hereof, save and except the gas reserves that are subject to that certain gas purchase contract dated December 10, 1954, between Seller and Transcontinental Gas Pipe Line Corporation, as amended, and which pertains to Seller's recoverable gas reserves in the South Duson Field.

Seller shall have the right to operate its properties free from any and all control by Buyer in such a manner as Seller in its sole discretion may deem advisable, including, without limitation, the right to drill new or additional wells, to repair and rework old wells, renew or extend, in whole or in part, any leases covered hereby and to abandon any well or surrender any lease, in whole or in part, when no longer deemed by Seller to be capable of producing gas in paying quantities under normal methods of operation.

Seller also reserves the right to pool and combine all or any part of the leases subject hereto with other properties owned by Seller or others, including the right to revise, combine or dissolve such units; in which event this contract shall extend and apply to the interest of Seller in the newly formed unit to the extent that such interest is derived from the lands and leaseholds covered hereby.

[fol. 26] In the event at any time, and from time to time, that Seller shall be prevented by regulatory order (either of suspension or otherwise) from receiving in full any price or tax reimbursement due under any of the provisions of Article IX or Article X hereof, then, on the expiration of five (5) calendar months from the issuance of such regulatory order, the coverage of this contract shall be restricted to the then proven gas reserves underlying Seller's leaseholds and units then subject hereto, unless within said 5-month period Seller gives written notice to Buyer that Seller elects not to have the coverage hereof so restricted. For this purpose, "Proven Gas Reserves" shall be considered as all gas otherwise covered hereby which is contained in a continuous reservoir which has either been recognized hereunder in compliance with the provisions of Article IV or in which the presence of gas has been established by and to the satisfaction of Seller.

Buyer shall take from Seller hereunder or pay Seller for, whether taken or not during each "contract year," as same is hereinafter defined, quantities of gas which are at least equal to the Annual Minimum Quantity during such contract year, provided that Seller is able to make deliveries of such Annual Minimum Quantity in accordance with the provisions hereof, and further, Buyer shall take from Seller, or pay Seller for, whether taken or not, during each month throughout each contract year, a quantity of gas which is not less than one twenty-fourth (1/24th) of the Annual Minimum Quantity in effect for such contract year. For the purposes hereof the term "Annual Minimum Quantity" shall mean a quantity of gas per contract year equal to the product of 45,625/1,000,000 times the quantity of Seller's Gas Reserves. The term "Gas Reserves" as used herein shall mean the estimated total quantity of recoverable gas owned by Seller and contained in the various gas-bearing formations or reservoirs underlying Seller's lands and leaseholds which are subject to the terms of this agreement. Such Gas Reserves shall be determined in accordance with the provisions of Article IV of this agreement.

Seller agrees that it will develop and maintain sufficient delivery capacity to enable it to deliver to Buyer hereunder, on each day throughout each contract year, a quantity of

gas which is equal to one and one-half (1½) times the daily average of the Annual Minimum Quantity in effect for such contract year. In the event that Seller should at any time [fol. 27] fail or be unable to deliver to Buyer hereunder the requested daily quantity of gas provided for in this paragraph: Then the Annual Minimum Quantity thereafter, until Seller has increased its delivery capacity, shall be reduced by the ratio that the quantity of delivery capacity which Seller does have bears to the quantity of delivery capacity required to enable Seller to deliver on any day one and one-half (1½) times the daily average of the Annual Minimum Quantity then in effect; provided, however, that thereafter whenever Seller by further development or other operations increases its delivery capacity, then and thereafter, the Annual Minimum Quantity shall be computed on a pro rata basis using the quantity of delivery capacity then available. In the event of any such change of the Annual Minimum Quantity for any contract year or a portion thereof, Buyer shall take from Seller, or pay Seller for, whether taken or not, during each month of such contract year or the portion thereof during which such change is in effect, a quantity of gas which is not less than one twenty-fourth (1/24th) of such changed Annual Minimum Quantity.

It is expressly understood that Buyer shall have the right and option to purchase at any time and from time to time, such daily quantity of gas as it desires up to one and one-half (1½) times the daily average of the Annual Minimum Quantity then in effect. Buyer may from time to time, with Seller's approval and agreement, take daily quantities of gas in excess of one and one-half (1½) times the daily average of the Annual Minimum Quantity. It is recognized that Seller is not obligated to provide processing facilities for any quantities of gas in excess of one and one-half (1½) times the daily average of the Annual Minimum Quantity in effect from time to time and, therefore, the quality specifications of Article VIII shall not apply to any additional gas which Seller may be willing to deliver to Buyer, which is in excess of the capacity of Seller's processing facilities as then installed and which is bypassed around such facilities.

In the event that Seller has developed its lands and leaseholds to the extent permitted by the rules and regulations of the regulatory body having jurisdiction, and Buyer's withdrawals of gas hereunder, over periods of reasonable duration, are insufficient to provide Seller with a ratable share of the total withdrawals by all producers from all of [fol. 28] the reservoirs covered hereby and Seller has available sufficient delivery capacity to enable Seller to deliver to Buyer one and one-half (1½) times the daily average of such ratable share, then Seller may call upon Buyer to increase its withdrawals to the extent necessary to enable Seller to produce its current ratable proportion of the total withdrawals of gas from said reservoirs and, in addition thereto, such quantities of gas as may be necessary to enable Seller to produce, over a reasonable period of time, any accumulated net deficiencies which may have occurred, since the date that Seller had such delivery capacity available, in Buyer's prior withdrawals of gas from Seller hereunder. In the event that Buyer, after receipt of such request from Seller, does not increase its withdrawals to the extent necessary to enable Seller to produce such current ratable quantities of gas and, over a reasonable period of time, any such accumulated net deficiency which may exist, then Buyer shall, upon request of Seller, release from this contract sufficient gas to enable Seller to find an acceptable market for gas and thus to correct such situation.

If, during any contract year, Buyer pays for gas which is not taken in accordance with the provisions hereof, Buyer shall have the right during the next succeeding contract year to make up such deficiency in takings by crediting such excess payments against quantities of gas taken during such succeeding contract year, which are in excess of the Annual Minimum Quantity for such succeeding contract year, in which such excess quantities of gas are so taken by Buyer, but in making up such deficiencies Buyer shall be required to pay to Seller any difference in the price prevailing for the contract year in which the deficiency is made up and the price paid for gas not taken during the contract year when the deficiency occurred.

II. Seller shall have the right from time to time, at any time throughout the term hereof, to produce gas from the wells on the lands and leaseholds covered hereby, and to return such gas to the formation from which it was produced, or to other formations underlying the lands and leaseholds covered hereby, after extracting and separating from said gas all or any part of the liquid and liquefiable hydrocarbons contained in and produced with said gas. Seller may also, during the term of this contract, utilize certain quantities of gas for repressuring and pressure maintenance operations in connection with the lands and leaseholds covered hereby. It is recognized that during the [fol. 29] period that Seller is conducting any such cycling, repressuring maintenance operations or any other gas injection operations that may be conducted for the purpose of increasing hydrocarbon recovery, Seller may reduce the quantities of gas it delivers to Buyer or may not deliver any gas to Buyer from the reservoir or reservoirs in which such operations are being conducted.

In the event Seller elects to carry on any cycling, repressuring or pressure maintenance operations or any other gas injection operations that may be conducted for the purpose of increasing hydrocarbon recovery and as a result thereof Buyer is prevented from receiving the Annual Minimum Quantity which would have been delivered had no such operations been conducted, then this contract shall be extended for an additional period of time sufficient to permit Buyer to receive such quantities of gas as it was prevented from receiving by such cycling, repressuring or pressure maintenance operations or any other gas injection operations that may be conducted for the purpose of increasing hydrocarbon recovery. It is expressly understood that if such operations reduce the daily quantity of gas available for Buyer to a quantity less than one and one-half (1½) times the daily average of the Annual Minimum Quantity, then the Annual Minimum Quantity shall be adjusted as provided in Article I hereof.

III. Seller agrees to deliver and Buyer agrees to receive the gas deliverable hereunder at (i) a mutually agreeable point in the Ridge Field in or near Section Twenty (20),

Township Ten (10) South, Range Three (3) East, Lafayette Parish, Louisiana, and (ii) a mutually agreeable point in each additional field which is discovered or developed in which other lands and leaseholds covered hereby are located. It is recognized that the gas delivered by Seller to Buyer at the delivery point or points described above may be delivered in a commingled stream with gas delivered to Buyer by other parties and, in that event, the commingled stream will be measured by Buyer through a common measuring station installed at each such delivery point.

Seller agrees to construct, operate and maintain, at its own expense, the necessary pipe line or lines from Seller's well or wells to said delivery point or points. Buyer agrees to construct a pipe line from its existing pipe line system to [fol. 30] said delivery point or points, which said pipe line shall also be used by Buyer to receive gas from other parties and other sources.

It is recognized that it shall be necessary for Seller and Buyer to obtain Certificates of Public Convenience and Necessity from the Federal Power Commission prior to the commencement of deliveries of gas hereunder. Seller and Buyer will each within sixty (60) days after the date of execution of this contract file with the Federal Power Commission their respective applications for such certificates. If either party shall fail to make such filing of its application for a certificate within said 60-day period, then the other party hereto shall have the right, at any time thereafter and until such party has made its said filing, to cancel this contract by written notice thereof to the other party. Such right of cancellation shall be in addition to the other rights of the party having the right of cancellation. Each party shall prosecute diligently its said Application for Certificate of Public Convenience and Necessity which, in the case of Seller, shall authorize it to initiate and continue the sale of gas hereunder and which, in the case of Buyer, shall authorize it to construct and operate the facilities required to receive and transport said quantities of gas.

Neither Seller nor Buyer shall be obligated to accept any Certificate of Public Convenience and Necessity authorizing the sale or purchase of gas hereunder which contains conditions that are not acceptable to the party to whom

such certificate was issued. In the event that either party shall be issued a certificate which is unacceptable to it, then this contract shall terminate without notice and shall be of no further force or effect on the expiration of the time within which such party could have accepted such certificate; provided, however, that there shall be no obligation on such party to act to extend such time for acceptance of the certificate offered, whether by motion or by petition for rehearing or review of the certificate order of the Commission; and, provided further, however, that, in the event such party does elect to move or petition the Commission or a court with reference to such order of the Commission, then this contract shall not terminate until the expiration of the extended time within which such party could have accepted the said certificate. In any event, if such certificates have not been issued and accepted by both parties hereto within [fol. 31] eight (8) months from the date of filing of the last application of the parties for such certificates, then either party hereto shall have the continuing right, on written notice to the other, to cancel and terminate this contract.

Seller and Buyer agree, after obtaining and accepting said Certificates of Public Convenience and Necessity, to proceed with reasonable diligence to perform all acts necessary to enable Seller to deliver and Buyer to receive gas hereunder. In the event deliveries of gas have not commenced hereunder within two (2) months from the date that both Seller and Buyer have obtained and accepted said Certificates of Public Convenience and Necessity and Seller is in readiness to commence deliveries of gas hereunder, Buyer shall be obligated at such time to commence paying for the Annual Minimum Quantity of gas then in effect hereunder as provided in Article I hereof but Buyer shall have the right to make up such gas, paid for but not taken in the period preceding the initial delivery of gas hereunder, during the next succeeding two (2) contract years, notwithstanding the provisions of Article I hereof.

IV. Seller and Buyer agree that for the purpose of this agreement Seller's Gas Reserves shall be determined in accordance with the following provisions:

Upon execution of this agreement, Seller shall, using its best judgment, estimate Seller's Gas Reserves and furnish such estimate to Buyer. From such estimate, Buyer and Seller shall attempt to agree upon the total quantity of Seller's Gas Reserves. In the event that no agreement is reached as to the total quantity of such Gas Reserves, the parties agree to submit the matter to arbitration in accordance with the provisions of Article XV hereof. From time to time after such first determination but not more often than once in any contract year, except by mutual agreement between the parties hereto or where Seller completes any well or wells in any reservoir or producing formation and the quantity of Gas Reserves contained therein have not previously been computed in any reserve determinations made hereunder, upon written request of either Buyer or Seller, to the other, Buyer and Seller will redetermine the total quantity of Seller's Gas Reserves in the same manner hereinabove set forth, it being understood that in the event the parties cannot reach an agreement in any such redetermination that the matter will be submitted to arbitration in accordance with the provisions of Article XV hereof.

[fol. 32] All reserve determinations which are made in accordance with the foregoing provisions of this Article IV shall be made, adjusted and determined as of the date of initial deliveries of gas under this contract, it being understood that the withdrawals of gas from such reserves after such initial delivery shall not be deducted in computing Seller's Gas Reserves. Any changes in Seller's Gas Reserves which may occur as a result of any redetermination of said Gas Reserves under the provisions of this contract shall be effective for the purpose of determining the Annual Minimum Quantity only from and after the date of such redetermination or redeterminations. The original determination and any redeterminations of Seller's Gas Reserves shall be stipulated in writing and signed by both parties hereto.

If the determination be made during a contract year and a change in the Annual Minimum Quantity results, the Annual Minimum Quantity for such contract year shall be computed on a pro rata basis using the values of reserve

effective before and after the date of such reserve determination.

V. Seller agrees to deliver the gas deliverable hereunder at a pressure sufficient to enter Buyer's line against the working pressures maintained therein from time to time at the above described delivery point or points; provided however, that Seller shall not be required to deliver any gas at a pressure in excess of one thousand (1000) pounds per square inch gauge at the delivery point in the Ridge Field nor at a pressure in excess of one thousand twenty-five (1025) pounds per square inch gauge at any other delivery points hereunder. In the event that compression should be necessary in order for the gas deliverable hereunder to be delivered at the required pressure, Seller shall have the option to install compressors and, in the event Seller does not elect to install compressors, then Buyer shall have the right, at its own risk, cost and expense, to install, operate and maintain compressors. However, it is expressly understood and agreed that neither party hereto shall be obligated to compress any gas under the terms of this agreement.

VI. At or near each delivery point hereunder, Buyer shall provide, operate and maintain, at its expense, a measuring station properly equipped with orifice meter or meters of standard type for the measurement of gas delivered to Buyer hereunder, it being recognized that such [fol. 33] measuring stations may also be utilized by Buyer for measuring as delivered to Buyer by other parties. Seller shall have access to the measuring equipment at all reasonable times, but readings, calibrations and adjustments thereof, and changing of charts shall be done by the employees or agents of Buyer. Buyer shall read the meters daily, and shall keep all measuring equipment accurate and in repair, making tests monthly; or meters shall be read or such tests made at such ... ls as may be deemed appropriate in the opin... ties. Buyer agrees to give Seller reasonal... such tests of Buyer's equipment so that if ... ires Seller may have its representative present. ...all have the right

to challenge the accuracy of said equipment and, when challenged, the equipment shall be tested and repaired by Buyer; the cost of such special test to be borne by Buyer if the percentage of inaccuracy is found to be more than two per cent (2%), but if the percentage of inaccuracy is found to be two per cent (2%) or less, the cost of such special test shall be borne by Seller. If said equipment is found on any test to be inaccurate more than two per cent (2%), then corrections shall be made for the time said equipment has been inaccurate, but in no event to extend back for a period of more than one-half of the time elapsed since the date of the last test and calibration. The charts and records from such measuring equipment shall remain the property of Buyer. Upon request of Seller, Buyer shall submit to Seller records and charts from its measuring equipment, together with calculations therefrom, for Seller's inspection and verification, subject to return by Seller within twenty (20) days from receipt thereof, after which return the charts and records shall be kept by Buyer on file for a period of one year and as long thereafter as it elects to keep the same and, in the event Buyer elects to destroy such records, it must first offer the same to Seller.

If, for any reason, meters are out of service or out of repair so that the amount of gas delivered cannot be ascertained or computed from the readings thereof, the gas delivered during the period such meters are out of service or out of repair shall be estimated and agreed upon by the parties hereto upon the basis of the best data available, using the first of the following methods which is feasible:

(a) By using the registration of any check meter or meters if installed and accurately registering;

[fol. 34] (b) By correcting the error if the percentage of error is ascertainable by calibration, test or mathematical calculation;

(c) By estimating the quantity of delivery by deliveries during preceding periods under similar conditions when the meter was registering accurately.

Seller may, at its option and expense, install and operate check meters to check Buyer's meters, but measurement of

gas for the purpose of this agreement shall be by Buyer's meters only, except in cases hereinabove specifically provided to the contrary. Check meters shall be either the orifice or volumetric type and shall be subject at all reasonable times to inspection or examination by Buyer, but the reading, calibration and adjustment thereof and changing of charts shall be done only by Seller.

VII. All gas delivered hereunder shall be measured in accordance with the basis of measurement provided for in the Standard Gas Measurement Law known as Act 479 of the Regular Session of the Louisiana Legislature, 1950, R.S. 55:151-55:156.

A "cubic foot of gas" for the purpose of measurement of the gas delivered by Seller to Buyer hereunder is the amount of gas necessary to fill a cubic foot of space when the gas is at the absolute pressure of fifteen and twenty-five thousandths (15.025) pounds per square inch and at a base temperature of sixty degrees (60°) Fahrenheit, and gas volumes shall be computed into such units in the manner described below.

The orifice coefficient for each meter shall be calculated at the above base pressure and base temperature, at a flowing temperature of sixty degrees (60°) Fahrenheit, and for a gas of sixty-hundredths (.60) specific gravity. For the purpose of measurement hereunder, the atmospheric pressure shall be assumed to be fourteen and seven-tenths (14.7) pounds per square inch. Pressure taps for orifice meter installations shall be taken from the pipe runs two and one-half ($2\frac{1}{2}$) internal pipe diameters upstream and eight (8) internal pipe diameters downstream from the face of the orifice plate.

The temperature of the gas delivered hereunder shall be determined by the use of recording thermometers so in- [fol. 35] stalled that they may properly record the temperature of the gas flowing through the meter or meters. The average temperature recorded shall be used in computing measurements and the orifice coefficient shall be corrected for variation in the average temperature from sixty degrees (60°) Fahrenheit.

The specific gravity of the gas shall be determined by recording specific gravity instruments of standard manufacture acceptable to both parties and installed so that they may properly record the specific gravity of the gas. The arithmetical average of the hourly specific gravity recording each day shall be deemed to be the specific gravity of the gas for that day, and the orifice coefficient shall be corrected for variation in the specific gravity of the gas from sixty-hundredths (.60).

All orifice meter computations required shall be made in accordance with formulae and tables contained in Metric Metal Works Bulletin E-2 (Revised 1931).

The volumes of gas as determined in the manner described above shall be adjusted to give effect to the deviation of such gas from Boyle's law, as follows:

(a) There shall be determined the average pressure (gauge) at which the gas was delivered during the 24-hour period under consideration;

(b) There shall be selected from the table of multipliers attached hereto and made a part hereof, and identified as Exhibit "B", the multiplier corresponding to the average pressure as determined in (a) above and to the flowing temperature which was used for the purpose of measurement during the period under consideration;

(c) The adjusted volume of gas for the period under consideration shall be the result obtained by multiplying the volume of gas as determined in the manner above set forth by the multiplier determined in (b) above.

If the Commissioner of Conservation of the State of Louisiana should at any time disapprove the multipliers set out in said Exhibit "B" or if at any time the composition of the gas delivered to Buyer hereunder shall have materially changed so that the multipliers set out in Exhibit "B" are no longer reasonable, either party may call [fol. 36] for a review of such multipliers. In such event, the parties shall agree upon the multipliers to be used thereafter and, in the event of failure to agree, the matter shall be submitted to arbitration in accordance with the provisions of Article XV hereof. Such new multipliers

shall be subject to the approval of the Commissioner of Conservation of the State of Louisiana, if such Commissioner at that time has jurisdiction over such matters.

VIII. The gas to be delivered hereunder shall be natural gas as produced in its natural state from the well or wells, free of objectionable liquids and solids, except that Seller shall separate or cause to be separated any liquid hydrocarbons; provided that, by such separation, the determined heating value of the gas shall not be reduced to less than one thousand (1,000) gross British Thermal Units per cubic foot of gas. Seller may extract or cause to be extracted any natural gasoline or other liquefiable hydrocarbons such as butane, propane and ethane, and such minimum quantities of methane as is necessary in extracting the other liquefiable hudrocarbons, it being understood that methane will not be extracted as a recoverable product and that by such extraction the determined heating value of the gas shall not be reduced to less than one thousand (1,000) gross British Thermal Units per cubic foot of gas. Seller agrees that, in separating the liquid hydrocarbons or in the event Seller extracts the natural gasoline and other liquefiable hydrocarbons and ethane, it will not subject said gas, nor permit said gas to be subjected, to any treatment in such separation or extraction processes which will change the chemical composition of any of the component parts of said gas, permit or cause the admission of oxygen, or which will dilute said gas, or cause the gas to fail to meet any of the quality specifications hereinafter set forth.

The gas delivered hereunder shall be merchantable gas and:

(a) Shall in no event have a water content in excess of seven (7) pounds of water per million (1,000,000) cubic feet of gas measured at a pressure base of fourteen and seven-tenths (14.7) pounds per square inch and at a temperature of sixty degrees (60°) Fahrenheit, as determined by a method mutually agreed upon or, upon failure to agree, by dew-point apparatus approved by the U.S. Bureau of Mines.

[fol. 37] (b) Shall be commercially free from hydrogen sulphide and shall not contain more than one (1) grain of hydrogen sulphide per hundred (100) cubic feet as determined by quantitative test after the presence of hydrogen sulphide has been indicated by qualitative test, which shall consist of exposing a strip of white filter paper, recently moistened with a solution of one hundred (100) grains of lead acetate in one hundred (100) cubic centimeters of water, to the gas for one and one-half (1½) minutes in an apparatus previously purged, through which the gas is flowing at the rate of approximately five (5) cubic feet per hour, the gas from the jet not impinging upon the test paper, and which qualitative test shall be deemed to be satisfied, if, after this exposure, the test paper is found not distinctly darker than a second paper freshly moistened with a similar solution not exposed to the gas.

(c) Shall not contain more than twenty (20) grains of total sulphur per one hundred (100) cubic feet.

(d) Shall not contain in excess of:

(i) Three per cent (3%) by volume of carbon dioxide;

(ii) One per cent (1%) by volume of oxygen;

(iii) Three per cent (3%) by volume of nitrogen;

(iv) Eleven hundred fifty (1150) gross British Thermal Units per cubic foot; or

(v) Two-tenths (0.2) gallon per thousand (1000) cubic feet of those certain liquefiable hydrocarbons commonly referred to as natural gasoline, as determined by the charcoal adsorpotion method as prescribed by the American Gas Association in its Testing Code No. 101, effective January 1, 1943.

In the event that the total heating value of the gas tendered for delivery hereunder should be less than one thousand (1000) British Thermal Units per cubic foot, Buyer shall have the option to refuse to accept said gas so long as said total heating value remains below one thousand (1000) British Thermal Units per cubic foot.

The total heating value of the gas in British Thermal Units per cubic foot shall be determined by Buyer at intervals of not more than ninety (90) days by means [fol. 38] of some approved method of general use in the gas industry. Seller shall have the right to determine, at such time or times as it may desire, the total heating value of the gas in British Thermal Units per cubic foot by means of some approved method of general use in the gas industry. Each party shall conduct at its own expense the test or tests made by it. Each party shall give to the other notice of the time of all tests for determining the British Thermal Unit content of the gas to be conducted by such party reasonably in advance of making the test in order that the other party may conveniently have its representative present. Should there be any material variance between tests by Buyer and Seller, a joint test will be run and will be controlling, effective from the first day of the calendar month preceding such joint test. The gross British Thermal Unit content per cubic foot shall be determined for a cubic foot of gas at a temperature of sixty degrees (60°) Fahrenheit when saturated with water vapor and at an absolute pressure equivalent to thirty inches (30″) of mercury at thirty-two degrees (32°) Fahrenheit.

Except as otherwise specifically provided to the contrary in this Article, all measurements of gas required in this Article shall be at a temperature of sixty degrees (60°) Fahrenheit and at an absolute pressure equivalent to thirty inches (30″) of mercury at thirty-two degrees (32°) Fahrenheit. In addition to meeting the above specifications, the gas delivered hereunder shall be commercially free from dust, gums, gum-forming constituents, or other liquid or solid matter which might become separated from the gas in the course of transportation through pipe lines.

IX. 1. The price to be paid by Buyer to Seller for each one thousand (1000) cubic feet of gas sold to Buyer hereunder during the five (5) year period commencing on the date of first delivery of gas hereunder or commencing on the date upon which Buyer becomes obligated to com-

mence making payment for gas hereunder in accordance with the provisions of Article III hereof, whichever is the earlier date, shall be twenty and one-half cents (20.5¢).

2. It is agreed the base price, subject to adjustment as hereinafter provided, to be paid by Buyer to Seller for each one thousand (1000) cubic feet of gas thereafter sold to Buyer hereunder shall be:

(a) During the next succeeding five (5) year period [fol. 39] commencing on the expiration of the period set forth in paragraph 1 of this Article IX, twenty-one and one-half cents (21.5¢).

(b) During the next succeeding five (5) year period commencing on the expiration of the period set forth in (a) above, twenty-two and one-half cents (22.5¢).

(c) During the next succeeding five (5) year period commencing upon the expiration of the period set forth in (b) above, twenty-three and one-half cents (23.5¢).

(d) During the period this contract remains in effect after the expiration of the period set forth in (c) above because of the extension of this contract in accordance with the provisions of Article II hereof, twenty-four and one-half cents (24.5¢).

(e) To insure in some measure to Seller and Buyer during the whole of the term of this agreement the real value of the gas represented by the stated contract price, for which they have each bargained and herein agreed one with the other, and to attempt to insure that the Buyer shall not have to pay more and the Seller shall not have to take less than such bargained-for real price for the gas sold hereunder, it is further agreed that the prices provided for in Sub-paragraphs (a), (b), (c) and (d) of this Paragraph 2 are base prices and shall be subject to adjustment either up or down in inverse proportion to changes in the purchasing power of the dollar.

The United States Department of Labor Index of Wholesale Prices of Commodities Other Than Farm Products and Food, based upon the period 1947-1949 as 100, shall

be used to compute changes in the purchasing power of the dollar as follows:

The purchasing power of the dollar as indicated by the index for the period 1947-1949 shall be taken as 1.000. The relative purchasing power of the dollar for any specified period shall be computed as 100 divided by the Index of Wholesale Prices of Commodities Other Than Farm Products and Food for such period, the result being expressed decimally to the nearest third significant figure, e.g., for a Wholesale Price Index of 120 the computation would be $\frac{100}{120} = .833$.

[fol. 40] The reference purchasing power of the dollar for purposes of price adjustments hereunder is taken as .826. The basis for adjusting the prices stated for the 5-year period covered by Paragraph (a) above and for the periods covered by Paragraphs (b), (c) and (d) shall be the average computed purchasing power of the dollar for the 12-month period ending three (3) months before the date on which price adjustment is to become effective. If such average computed purchasing power for the specified 12-month period results in an increase or decrease of less than One-half Cent (½¢) per MCF, no adjustment in price shall be made. Thus, if the base price is 21.5¢ and the computed purchasing power of the dollar has declined to .779, the adjusted price shall be:

$$21.5 \times \frac{.826}{.779} = 22.80¢ \text{ per MCF}$$

In making this computation, the applicable adjusted price shall be determined to the nearest two (2) significant decimal places.

It is agreed that if Seller is prevented by valid regulatory action from receiving any increase in price due hereunder, then the provisions of this Subparagraph (e) of Article IX shall be inoperative to reduce the price hereunder until Seller obtains under the provisions of this Subparagraph (e) of Article IX an increase in such price.

3. It is further agreed that Seller may request a redetermination of the price to be applicable for each of the respective periods set forth under Paragraph 2 above. Requests for such redetermination shall be made and concluded not earlier than nine (9) months nor later than three (3) months prior to the beginning of each respective period. Upon the conclusion of each such redetermination, Seller may, at Seller's option, substitute such redetermined price for the price otherwise payable under Paragraph 2 of this Article IX and Buyer agrees that it will pay such redetermined price for gas delivered hereunder during such period for which said price has been established.

For the purpose of redetermining such price, the parties hereto shall determine the three highest prices, each of which shall be the weighted average price (weighted for time only) that the respective contract provides will be paid [fol. 41] during the respective period under consideration by three (3) separate purchasers (including Buyer) to producers for gas for transportation or resale in interstate commerce in arm's-length agreements between non-affiliated companies, and covering gas to be produced from fields lying wholly or partly within those Parishes in the State of Louisiana lying south of a line formed by the northern boundary of Beauregard, Allen, Evangeline, St. Landry and Pointe Coupee Parishes and west of the Mississippi River. The agreements selected shall each provide for deliveries of gas in daily quantities approximating between fifty per cent (50%) and one hundred fifty per cent (150%) of the quantities provided herein, over a similar length of time and upon substantially the same terms of quality, measurement and delivery provided herein, and the redetermined price shall be the arithmetical average of such three (3) highest prices.

X. Seller agrees to pay, or cause to be paid, all taxes and assessments imposed on Seller with respect to the gas delivered hereunder prior to its delivery to Buyer, and Buyer agrees to pay, or cause to be paid, all taxes and assessments imposed upon Buyer with respect to the gas delivered hereunder after its receipt by Buyer. Neither party shall be responsible or liable for any taxes or other

statutory charges levied or assessed against any of the facilities of the other party used for the purpose of carrying out the provisions of this contract.

Buyer agrees to reimburse Seller for all gathering taxes up to, but not in excess of, the amount of the gathering tax presently levied by R. S. 47:671-677, as amended by Act 45 of the Louisiana Legislature, Regular Session of 1954, lawfully imposed upon and paid by Seller with respect to the gas delivered hereunder.

All taxes which are in effect on the date of execution hereof, up to the respective rates thereof on such date, shall not be considered as "new, additional or increased taxes" under the following provisions of this Article. In the event that any new, additional or increased taxes are hereafter lawfully imposed on and paid by Seller with respect to the gas delivered hereunder, Buyer agrees to reimburse Seller for three-fourths (3/4ths) of the amount of any such new, additional or increased taxes so paid by Seller or which Seller under contractual or legal obligation [fol. 42] pays to the person or company on which such taxes are levied.

The term "tax" as used herein shall mean any tax (other than ad valorem, income or excess profits tax), license, fee or charge now or hereafter levied, assessed or made by any governmental authority on the gas itself or on the act, right or privilege of production, severance, gathering, transportation, handling, sale or delivery of gas which is measured by the volume, value or sales price of the gas in question; provided, however, that the term "tax" shall not be deemed to include any general franchise tax imposed on corporations on account of their corporate existence or on their right to do business within the state as a foreign corporation.

XI. For the purpose of billing and accounting for the gas delivered hereunder the day shall begin at 7:00 A.M. and extend to 7:00 A.M. of the following day, and the month (hereinafter called "billing month") shall begin at 7:00 A.M. on the first day of the calendar month and extend to 7:00 A.M. on the first day of the following calendar month, except that the first billing month shall begin at (i) 7:00

A.M. on the first day upon which deliveries of gas are commenced hereunder, or (ii) 7:00 A.M. on the first day upon which Buyer becomes obligated to commence making payment for gas hereunder in accordance with the provisions of Article III hereof, whichever is the earlier date, and extend to 7:00 A.M. of the first day of the following calendar month. The term "contract year" shall mean a period of twelve (12) consecutive months beginning on (i) the first day of the billing month (or any anniversary of such date) following the day upon which deliveries of gas are commenced hereunder, or (ii) the first day of the billing month (or any anniversary of such date) following the day upon which Buyer becomes obligated to commence making payment for gas hereunder in accordance with the provisions of Article III hereof, which ever is the earlier date. It is expressly understood and agreed that the first contract year shall include the first billing month.

It is recognized that the gas delivered by Seller hereunder may be commingled with gas delivered by other parties and, in that event, such gas shall be measured by Buyer through a common measuring station at each delivery point. Seller agrees to furnish, or cause to be furnished to Buyer, on or before the tenth (10th) day of each calendar month [fol. 43] an allocation statement setting forth the respective percentages of the total quantity of gas received by Buyer at such common measuring stations during the preceding billing month which was delivered by Seller and the other parties with whom Buyer enters into contracts for the purchase of gas at such common measuring stations. Buyer shall be entitled to rely conclusively on such allocation statement and shall have a complete defense to any claim by Seller for any sums due for gas delivered hereunder during any period by showing that Buyer has paid Seller for Seller's percentage, as set forth in such allocation statement, of the total quantity of gas received by Buyer at such measuring stations during the period in question.

Buyer agrees to make payment during each calendar month to Seller for all gas delivered hereunder during the preceding billing month.

Buyer shall, within sixty (60) days after the termination of each contract year, render to Seller a statement showing the total quantity of gas received by Buyer hereunder during such contract year and, in the event that such quantity of gas so received by Buyer is less than the Annual Minimum Quantity of gas which Buyer was obligated to receive during such contract year, Buyer shall, subject to the provisions of Article I hereof, make payment with such statement for the difference between the total amount paid by Buyer for the gas received hereunder during such contract year and the amount which Buyer would have paid in the event that Buyer had received the Annual Minimum Quantity of gas which it was obligated to receive during such contract year.

XII. Seller hereby warrants the title to all gas delivered hereunder, the right to sell the same, and that it is free from all liens and adverse claims, and agrees, if notified thereof by Buyer, to indemnify Buyer against all suits, actions, debts, accounts, damages, costs, losses and expenses arising from or out of any adverse legal claims of any and all persons to or against said gas.

It is recognized that all or a part of the wells from which gas will be delivered hereunder are owned jointly by Seller and other parties and that Seller may be the operator of some of such wells. Seller further warrants that no gas will be delivered from those wells, if any, of which Seller [fol. 44] is the operator except gas which is owned by Seller (including the gas, if any, of its royalty owners) and other parties with whom Buyer enters into contracts for the purchase of gas. Buyer agrees that no gas other than Seller's will be metered through the delivery points provided for hereunder except the gas (of other parties) produced from leaseholds in which Seller owns an interest and from which Seller's gas is being sold to Buyer hereunder. Buyer will keep Seller advised of the parties with whom Buyer has contracted to purchase gas from the dedicated area.

Seller agrees to pay, or cause to be paid, to the parties entitled thereto all royalties, overriding royalties, payments

out of production and other like charges on all gas delivered hereunder.

XIII. Buyer shall, in so far as Seller is able to convey such rights, have an easement and servitude on Seller's lands and leaseholds for installing, operating and maintaining equipment, with the right to remove the same before or within a reasonable time after the expiration of this contract; shall further have the right to operate, inspect and test measuring equipment; and shall, at all times, have the right to free access to any part of Seller's leaseholds for any purpose connected with any matter or thing covered by this contract.

XIV. This contract shall continue and remain in full force and effect for a term of twenty (20) years from (i) the date that deliveries of gas are commenced hereunder, or (ii) the date that Buyer becomes obligated to commence making payment for gas hereunder in accordance with the provisions of Article III hereof, whichever is the earlier date, and shall continue in force and effect thereafter for the additional period of time, if any, provided for in Article II hereof.

XV. Any dispute arising between Seller and Buyer in connection with the determination of Gas Reserves, as provided in Article IV, or the deviation multipliers, as provided in Article VII hereof, shall be determined by a board of three arbitrators to be selected for each such controversy so arising as follows: Either of the parties to such controversy may, at any time such board of arbitration is desired by it, notify the other party to such controversy in writing of the name of an arbitrator, and such other party shall select an arbitrator and notify the party desiring arbitration of the name of such arbitrator within [fol. 45] twenty (20) days. If such other party shall fail within twenty (20) days to name a second arbitrator, then the party who first served the notice may on reasonable notice to the other party apply to the person who is then presiding judge of the United States Court of Appeals for the Fifth Circuit at New Orleans, Louisiana, for the ap-

pointment of such second arbitrator for or on behalf of the other party and in such case the arbitrator appointed by the person who is such judge shall act as if named by the other party. The two arbitrators chosen as above provided for shall within twenty (20) days after the appointment of the second arbitrator choose the third arbitrator and, in the event of their failure to do so within said twenty (20) days, either of the parties hereto may in like manner, on reasonable notice to the other party, apply to the person who is such judge for the appointment of a third arbitrator and, in such case, the arbitrator appointed by the person who is such judge shall act as third arbitrator. The board so constituted shall fix a reasonable time and place for the hearing, at which time each of the parties hereto may submit such evidence as it may see fit. Such board shall determine the matters submitted to it pursuant to the provisions of this agreement.

The action of a majority of the members of such board shall govern and their decision in writing shall be final and binding on the parties hereto.

Each party shall pay the expense of the arbitrator selected by or for it and all other costs of the arbitration shall be equally divided between the parties hereto.

XVI. In the event of either party being rendered unable, wholly or in part, by force majeure to carry out its obligations (excepting the obligation to make payment of money when due—it being understood that there is no obligation on Buyer to pay for any gas not taken by Buyer by reason of force majeure) under this contract (except Buyer's obligation to commence taking gas hereunder or pay therefor as provided in Article III), it is agreed that, on such party giving notice and reasonably full particulars of such force majeure in writing or by telegraph to the other party within a reasonable time after the occurrence of the cause relied on, then the obligations of the party giving such notice, so far as they are affected by such force majeure, shall be suspended during the continuance of any inability so caused [fol. 46] but for no longer period, and such cause shall so far as possible be remedied with all reasonable dispatch.

The term "force majeure," as employed herein, shall mean acts of God, strikes, lockouts or other industrial disturbances, acts of the public enemy, wars, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, high water, washouts, arrests and restraints of governments and people, civil disturbances, explosions, breakage or accident to machinery or lines of pipe, freezing of wells or lines of pipe, partial or entire failure of natural gas wells, and any other causes, whether herein enumerated or otherwise, not reasonably within the control of the party claiming suspension; such term shall likewise include (a) in those instances where any party hereto is required to obtain servitudes, rights of way grants, permits or licenses to enable such party to fulfill its obligations hereunder, the inability of such party to acquire, or the delays on the part of such party in acquiring, at reasonable cost and after the exercise of reasonable diligence, such servitudes, rights of way grants, permits or licenses, and (b) in those instances where any party hereto is required to furnish materials and supplies for the purpose of constructing or maintaining facilities, the inability of such party to acquire, or the delays on the part of such party in acquiring, at reasonable cost and after the exercise of reasonable diligence, such materials and supplies.

It is understood and agreed that the settlement of strikes or lockouts shall be entirely within the discretion of the party having the difficulty, and that the above requirement that any force majeure shall be remedied with all reasonable dispatch shall not require the settlement of strikes or lockouts by acceding to the demands of the opposing party when such course is inadvisable in the discretion of the party having the difficulty.

XVII. This contract is subject to all present and future valid orders, rules and regulations of any regulatory body of the Federal Government or the State in which these premises are situated, having jurisdiction.

XVIII. As between the parties hereto, Seller shall be in control and possession of its gas deliverable hereunder and responsible for any damage or injury caused thereby

[fol. 47] until the same shall have been delivered to Buyer at said point or points of delivery, after which delivery Buyer shall be in exclusive control and possession thereof and responsible for any injury or damage.

XIX. All the stipulations, terms and conditions of this contract shall extend to and be binding upon the respective successors and assigns of the parties hereto and shall constitute a real right and covenant running with the land. Seller hereby agrees that, in the event Seller assigns or conveys all or any part of the lands and leaseholds covered by this contract, Seller shall provide in such assignment or conveyance that such lands and leaseholds are assigned or conveyed subject to the terms and provisions of this contract and that the party or parties to whom such assignment or conveyance is made shall be bound by the terms and provisions of this contract. It is further understood and agreed that any assignment or conveyance of any interest of Seller in accordance with the provisions of this Article shall not be binding upon Buyer until Buyer has been furnished with proper transfer orders and a certified copy of such assignment or conveyance.

In Witness Whereof, the parties hereto have caused this agreement to be executed, in duplicate originals, by their respective corporate officers, thereunto duly authorized, as of the day and in the year first hereinabove written.

Sunray Mid-Continent Oil Company

By R. E. Foss
Vice President Form Approved

Attorney

Witnesses:

Barbara B. (Illegible)

Attest:

J. W. Bennett
Assistant Secretary

Seller
United Gas Pipe Line Company

By C. C. Barnett
Vice President

Witnesses:

Dorothy Ogburn
Sandra McConnell

Attest:

(Name Illegible)
Asst. Secretary
Buyer DBK

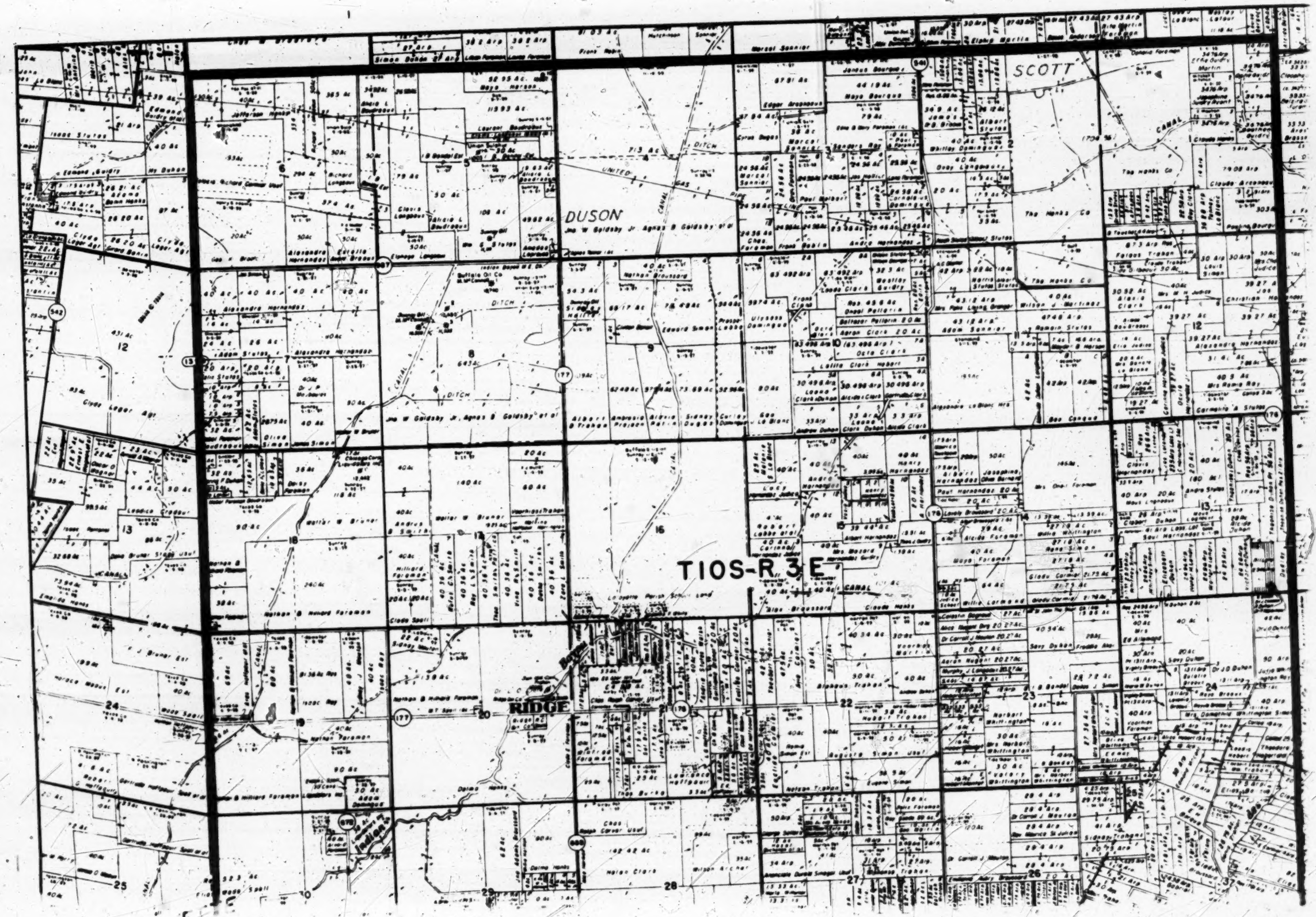
[Verified.]

[fol. 49]

Exhibit "A"

Map of areas in Lafayette and Vermilion Parishes, Louisiana, covered by contract.

(See Opposite) ☞


DUSON
SCOTT
RIDGE
T10S-R3E
DITCH
CANAL
UNITED GAS PIPE LINE
Clyde Logan Agt
The Hanks Co
Buffalo Oil Co
Indian Bayou
Bayou Carlin
Bayou Dubois
Bayou Carlin Usuf
Bayou Carlin Judice
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SCOTT

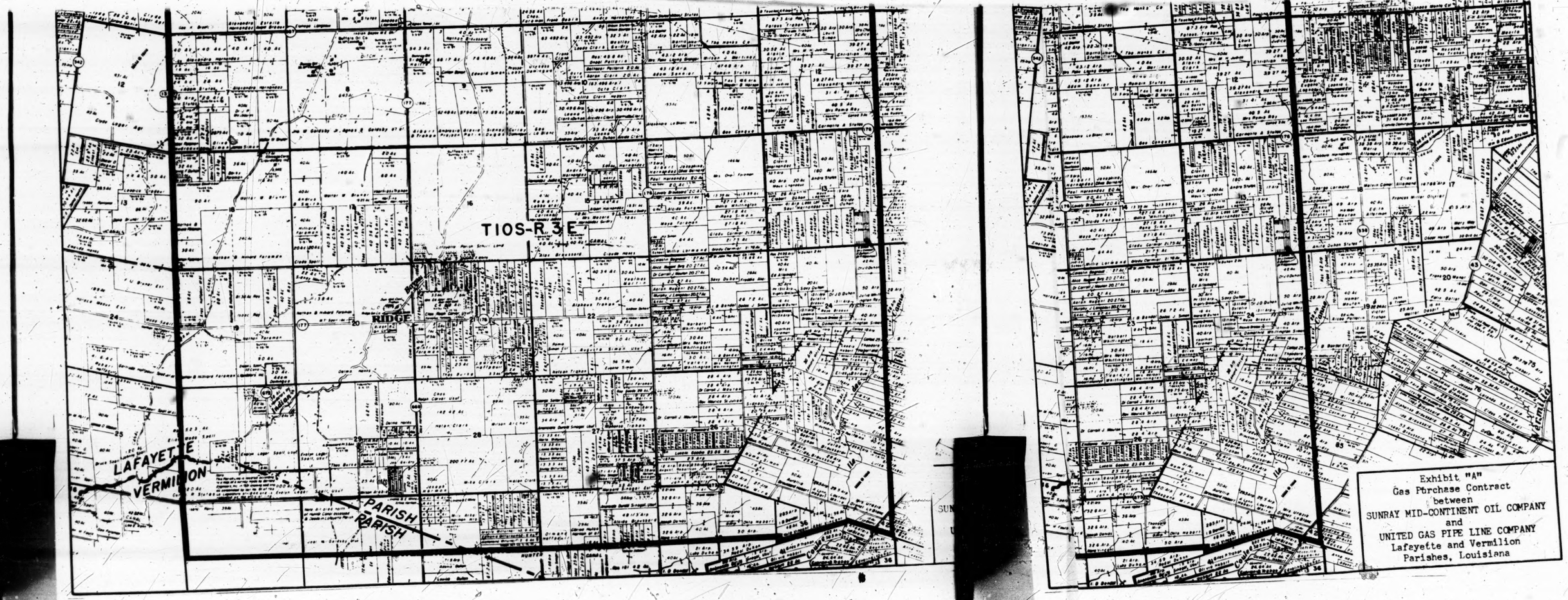

Exhibit "A"
Gas Purchase Contract
between
SUNRAY MID-CONTINENT OIL COMPANY
and
UNITED GAS PIPE LINE COMPANY
Lafayette and Vermilion
Parishes, Louisiana

[fol. 51]

EXHIBIT "B"

Boyle's Law Deviation Multipliers for office meters.

(See Opposite) ☞

Boy

[illegible] LAPSE DEVIATION MULTIPLIERS FOR [illegible] HEIGHTS

Average Temperature - 7

Average Pressure Psig	40-44	45-49	50-54	55-59	60-64	65-69	70-74	75-79	80-84	85-89	90-94	95-99	100-104	105-109	110-
0-49	1.004	1.004	1.004	1.003	1.003	1.003	1.002	1.002	1.002	1.002	1.002	1.002	1.002	1.002	1.0
50-99	1.009	1.009	1.009	1.008	1.008	1.008	1.008	1.007	1.007	1.007	1.007	1.006	1.006	1.006	1.0
100-149	1.014	1.014	1.013	1.013	1.012	1.012	1.012	1.011	1.011	1.010	1.010	1.010	1.009	1.009	1.0
150-199	1.019	1.018	1.017	1.017	1.016	1.016	1.015	1.015	1.014	1.014	1.014	1.013	1.013	1.012	1.0
200-249	1.024	1.023	1.022	1.022	1.021	1.020	1.020	1.019	1.018	1.018	1.017	1.017	1.016	1.015	1.0
250-299	1.029	1.028	1.027	1.026	1.025	1.024	1.024	1.023	1.022	1.021	1.021	1.020	1.019	1.019	1.0
300-349	1.034	1.033	1.032	1.031	1.030	1.029	1.028	1.027	1.026	1.025	1.024	1.024	1.023	1.022	1.0
350-399	1.039	1.038	1.036	1.035	1.034	1.033	1.032	1.031	1.030	1.029	1.028	1.027	1.026	1.025	1.0
400-449	1.044	1.043	1.041	1.040	1.039	1.038	1.036	1.035	1.034	1.033	1.032	1.031	1.030	1.029	1.0
450-499	1.050	1.048	1.046	1.045	1.043	1.042	1.040	1.039	1.038	1.036	1.035	1.034	1.033	1.031	1.0
500-549	1.055	1.053	1.051	1.049	1.048	1.046	1.045	1.043	1.041	1.040	1.039	1.037	1.036	1.035	1.0
550-599	1.060	1.058	1.056	1.054	1.052	1.051	1.049	1.047	1.045	1.044	1.042	1.040	1.039	1.038	1.0
600-649	1.066	1.064	1.062	1.059	1.057	1.055	1.053	1.052	1.049	1.048	1.046	1.044	1.042	1.041	1.0
650-699	1.072	1.069	1.067	1.064	1.062	1.059	1.057	1.055	1.053	1.052	1.050	1.048	1.046	1.044	1.0
700-749	1.077	1.075	1.072	1.069	1.067	1.064	1.061	1.059	1.057	1.055	1.053	1.051	1.049	1.047	1.0
750-799	1.083	1.080	1.077	1.074	1.071	1.068	1.066	1.063	1.061	1.059	1.057	1.054	1.052	1.050	1.0
800-849	1.089	1.085	1.082	1.079	1.076	1.072	1.070	1.067	1.064	1.062	1.060	1.058	1.056	1.054	1.0
850-899	1.094	1.090	1.087	1.083	1.080	1.077	1.074	1.071	1.068	1.066	1.06	1.061	1.059	1.057	1.0
900-949	1.100	1.096	1.092	1.088	1.084	1.081	1.078	1.075	1.072	1.069	1.067	1.064	1.062	1.060	1.0
950-999	1.105	1.101	1.097	1.092	1.089	1.085	1.082	1.078	1.075	1.073	1.07	1.067	1.065	1.063	1.0
1000-1049	1.111	1.106	1.102	1.097	1.093	1.089	1.085	1.082	1.079	1.076	1.07	1.071	1.068	1.065	1.0
1050-1099	1.117	1.112	1.107	1.102	1.098	1.093	1.090	1.086	1.082	1.079	1.07	1.074	1.071	1.069	1.0
1100-1149	1.122	1.117	1.111	1.106	1.102	1.097	1.093	1.089	1.086	1.083	1.08	1.077	1.074	1.072	1.0
1150-1199	1.127	1.122	1.116	1.110	1.106	1.101	1.097	1.093	1.089	1.086	1.08	1.080	1.077	1.074	1.0
1200-1249	1.133	1.127	1.121	1.115	1.110	1.105	1.100	1.096	1.092	1.089	1.08	1.083	1.079	1.077	1.0
1250-1299	1.139	1.132	1.125	1.119	1.113	1.108	1.104	1.100	1.096	1.092	1.08	1.085	1.082	1.080	1.0
1300-1349	1.144	1.138	1.129	1.123	1.117	1.112	1.107	1.103	1.099	1.095	1.09	1.089	1.085	1.082	1.0
1350-1399	1.149	1.141	1.134	1.127	1.121	1.115	1.110	1.106	1.102	1.098	1.09	1.091	1.088	1.085	1.0
1400-1449	1.154	1.146	1.138	1.131	1.125	1.119	1.114	1.109	1.105	1.101	1.09	1.094	1.090	1.087	1.0
1450-1499	1.159	1.150	1.142	1.135	1.128	1.122	1.117	1.113	1.108	1.104	1.10	1.098	1.093	1.089	1.0

[illegible] LAPSE DEVIATION MULTIPLIERS FOR [illegible] HEIGHTS

Average Temperature - 7

80-84	85-89	90-94	95-99	100-104	105-109	110-114	115-119	120-124	125-129	130-134	135-139	140-144	145-149	Average Pressure Psig
1.002	1.002	1.002	1.002	1.002	1.002	1.002	1.002	1.002	1.002	1.002	1.002	1.002	1.002	0-49
1.007	1.007	1.007	1.006	1.006	1.006	1.006	1.006	1.006	1.006	1.006	1.006	1.006	1.006	50-99
1.011	1.010	1.010	1.010	1.009	1.009	1.009	1.008	1.008	1.008	1.008	1.007	1.007	1.007	100-149
1.014	1.014	1.014	1.013	1.013	1.012	1.012	1.011	1.011	1.011	1.010	1.010	1.010	1.009	150-199
1.016	1.018	1.017	1.017	1.016	1.015	1.015	1.014	1.014	1.013	1.013	1.012	1.012	1.011	200-249
1.022	1.021	1.021	1.020	1.019	1.019	1.018	1.017	1.016	1.016	1.015	1.015	1.014		250-299
1.026	1.025	1.024	1.024	1.023	1.022	1.021	1.020	1.020	1.019	1.018	1.017	1.017	1.016	300-349
1.030	1.029	1.028	1.027	1.026	1.025	1.024	1.023	1.022	1.021	1.021	1.020	1.019	1.019	350-399
1.034	1.033	1.032	1.031	1.030	1.029	1.028	1.027	1.026	1.025	1.024	1.023	1.022	1.021	400-449
1.038	1.036	1.035	1.034	1.033	1.031	1.030	1.029	1.028	1.027	1.027	1.026	1.025	1.024	450-499
1.041	1.040	1.039	1.037	1.036	1.035	1.033	1.032	1.031	1.030	1.029	1.028	1.027	1.026	500-549
1.045	1.044	1.042	1.040	1.039	1.038	1.036	1.035	1.033	1.032	1.031	1.030	1.029	1.028	550-599
1.049	1.048	1.046	1.044	1.042	1.041	1.039	1.038	1.036	1.035	1.034	1.033	1.031	1.030	600-649
1.053	1.052	1.050	1.048	1.046	1.044	1.043	1.041	1.040	1.038	1.036	1.035	1.034	1.032	650-699
1.057	1.055	1.053	1.051	1.049	1.047	1.045	1.044	1.042	1.041	1.039	1.038	1.036	1.035	700-749
1.061	1.059	1.057	1.054	1.052	1.050	1.049	1.047	1.045	1.043	1.041	1.040	1.039	1.037	750-799
1.064	1.062	1.060	1.058	1.056	1.054	1.052	1.050	1.048	1.046	1.044	1.043	1.041	1.040	800-849
1.068	1.065	1.063	1.061	1.059	1.057	1.055	1.053	1.051	1.049	1.047	1.045	1.044	1.042	850-899
1.072	1.069	1.067	1.064	1.062	1.060	1.058	1.055	1.053	1.051	1.049	1.047	1.046	1.044	900-949
1.075	1.073	1.071	1.067	1.065	1.063	1.061	1.058	1.056	1.054	1.052	1.050	1.048	1.046	950-999
1.079	1.076	1.07	1.071	1.068	1.065	1.063	1.061	1.059	1.056	1.054	1.052	1.050	1.048	1000-1049
1.082	1.079	1.07	1.074	1.071	1.069	1.067	1.064	1.062	1.059	1.057	1.055	1.053	1.051	1050-1099
1.086	1.083	1.08	1.077	1.074	1.072	1.069	1.067	1.064	1.062	1.059	1.057	1.055	1.053	1100-1149
1.089	1.086	1.08	1.080	1.077	1.074	1.072	1.069	1.066	1.064	1.062	1.059	1.057	1.055	1150-1199
1.092	1.089	1.08	1.083	1.079	1.077	1.074	1.071	1.068	1.066	1.064	1.061	1.059	1.056	1200-1249
1.096	1.092	1.08	1.085	1.082	1.080	1.077	1.074	1.071	1.068	1.066	1.063	1.061	1.058	1250-1299
1.099	1.095	1.09	1.089	1.085	1.082	1.079	1.076	1.072	1.071	1.068	1.066	1.062	1.060	1300-1349
1.102	1.098	1.09	1.091	1.088	1.085	1.082	1.079	1.076	1.073	1.070	1.067	1.064	1.062	1350-1399
1.105	1.101	1.09	1.094	1.090	1.087	1.084	1.081	1.078	1.075	1.072	1.069	1.066	1.064	1400-1449
1.108	1.104	1.10	1.096	1.093	1.089	1.086	1.083	1.080	1.077	1.073	1.070	1.068	1.065	1450-1499

[fol. 53]

EXHIBIT B-1

United Gas Pipe Line Company
Shreveport, Louisiana

January 1, 1957

Sunray Mid-Continent Oil Company, P. O. Box 2039, Tulsa 2, Oklahoma.

Gentlemen: Please refer to that certain Gas Purchase Contract of even date herewith entered into by and between you, as Seller, and United Gas Pipe Line Company, as Buyer, relating to the sale and purchase of gas produced from certain lands and leaseholds in Lafayette and Vermilion Parishes, Louisiana. At sometime during the term of said contract you may complete on the lands and leaseholds covered thereby a well or wells in a reservoir or producing formation containing Gas Reserves that have not previously been computed in any reserve determination made under Article IV of said contract. In such event the amount of such new Gas Reserves would not be added to your Gas Reserves then in effect until a reserve redetermination is made in accordance with the provisions of said Article IV. In view of the foregoing, you have requested that the estimated amount of such new Gas Reserves be included in making all the calculations and computations under the provisions of Article I of the above described contract until such time as a reserve redetermination is made under the provisions of Article IV of said contract. We are agreeable to the foregoing procedure requested by you subject to the terms and provisions hereinafter set forth.

Accordingly, this letter will evidence our agreement with you that for each well completed in a reservoir or producing formation underlying lands and leaseholds covered by the above described contract which contains Gas Reserves that have not previously been computed in any reserve determination made under the above described contract, the Gas Reserves for each such well shall, during the period hereinafter provided, be estimated to be sixteen billion

cubic feet of Gas Reserves. Such estimated amount of new Gas Reserves shall be effective from and after the date deliveries of gas commence from the well in question and remain in effect thereafter until a reserve redetermination is made under the provisions of Article IV of said contract; provided, however, that in no event shall such estimated [fol. 54] amount of new Gas Reserves remain in effect for a period of more than one year from the date deliveries of gas commence from the well in question. The estimated amount of such new Gas Reserves shall, during the period such Gas Reserves are in effect, be added to the amount of your Gas Reserves then in effect under the above described contract and shall be included in making all calculations and computations under the provisions of Article I of said contract; it being understood that if the addition of such estimated new Gas Reserves occurs during a contract year (as defined in said contract) and a change in the Annual Minimum Quantity (as defined in said contract) results, the Annual Minimum Quantity for the contract year in question shall be computed on a pro rata basis using the values of reserve effective before and after the inclusion of such estimated new Gas Reserves.

The parties hereto further agree that the term "Proven Gas Reserves", as defined in Article I of the above described Gas Purchase Contract, shall be construed to include the Gas Reserves contained in a continuous reservoir which is recognized under the provisions of this supplemental letter agreement.

If the foregoing is acceptable to you, please indicate your acceptance in the space provided below and return one of the duplicate originals hereof to us for our file, thus constituting this letter a supplemental agreement to the above described contract and binding upon us, our respective successors and assigns.

Yours very truly,

United Gas Pipe Line Company
C. C. Barnett
Vice President

Approved As To Form
DBK

Accepted and agreed to:

Sunray Mid-Continent Oil Company
By R. E. Foss
Vice President

Form Approved? (Illegible) Attorney

[fol. 55]

BEFORE THE FEDERAL POWER COMMISSION

DECISION—February 3, 1958

Marsh, Presiding Examiner: These are proceedings pursuant to the provisions of Section 7(c) of the Natural Gas Act (the Act). Applications for certificates of public convenience and necessity pursuant thereto were filed, respectively, by Sunray Mid-Continent Oil Company (Sunray), in Docket No. G-12211 on March 11, 1957, by Buffalo Oil Company (Buffalo), in Docket No. G-12214, on March 13, 1957, by Warren Petroleum Corporation (Warren), in Docket No. G-12215, on March 13, 1957, and by United Gas Pipe Line Company (United), in Docket No. G-12270 on March 22, 1957. Each of the applicants sought authority to render the services described therein which are more particularly hereafter delineated.

Notice of the filing of the applications above described and of their consolidation for hearing purposes (which, incidentally, fixed a date on or before which protests or petitions to intervene might be filed) was duly published, and was served upon all interested parties of record. Thereafter, a notice setting the matter down for hearing was similarly published and served. Pursuant to such notice, the matter came on for hearing and was heard with the undersigned examiner presiding. So far as the record discloses no protests or petitions to intervene have been filed.

At the conclusion of the presentation of evidence counsel for United requested, in accordance with Section 1.30 (c) of the Commission's Rules of Practice, the waiver of the intermediate decision procedure. That request was joined and concurred in by Sunray, Buffalo and Warren. Counsel

of the Staff of the Commission neither concurred in the request nor took a position in opposition to it. The request was promptly submitted to the Commission for its consideration and disposition. Subsequently, the Commission denied the motion for the omission of the intermediate decision procedure. Thereafter, United and Sunray filed applications requesting that the Commission reconsider its order denying the motion for omission of the intermediate decision procedure. Later, the Commission issued an order denying the motion for rehearing.

At the hearing the parties to the proceeding and the Staff [fol. 56] of the Commission were afforded a full opportunity to present evidence, and subsequently they have had an opportunity to file briefs.

The Evidence

United Gas Pipe Line Company is a Delaware Corporation, having its principal place of business in Shreveport, Louisiana. United owns and operates a natural gas pipeline system situated in the states of Texas, Louisiana, Mississippi, Alabama and Florida, through and by means of which natural gas is transported out of the state in which such gas is produced through and into other states for the purpose of sale in interstate commerce for resale. The company is engaged in the transmission and sale in interstate commerce of natural gas for resale, and is a natural-gas company within the meaning of the Natural Gas Act. (cf. Docket No. G-232, 3 F.P.C. 863, Docket No. G-214, 2 F.P.C. 1040, and Docket Nos. G-1447, G-2119, G-9547 and G-10592).

Although United is a natural-gas company, the application filed herein at Docket No. G-12270 was filed under protest and without admitting the necessity of such filing but rather denying same, and United reserved the right to contest at any time and in any manner any ruling that such a certificate is required.

In its application United sought authorization, if such were required, to construct a purchase meter station, 3.1 miles of eight inch pipeline and appuretenant (sic) facilities beginning at a point in the Ridge area in Lafayette and

Vermilion Parishes, Louisiana, and extending to a point on United's 10-inch transmission line near Milepost 110 in said Lafayette Parish, "together with other facilities required from time to time to connect or to take additional deliveries from wells in said area." As will more particularly hereinafter appear, those facilities would be used to transport natural gas produced in that area and purchased from the three other applicants herein, Sunray, Buffalo and Warren.

The evidence discloses that United's 10-inch transmission line, with which the proposed facilities would be interconnected, extends from the point of interconnection in both an easterly and a westerly direction. Further east this line is interconnected with one of United's 20-inch lines which continues on in the same direction. The latter line, in turn, is interconnected with United's 30-inch transmission line [fol. 57] which extends to Kosciusko, Mississippi. From the 30-inch line, sales are made for resale and for the purposes thereof there are interconnected therewith other interstate transmission lines. By means of the foregoing pipeline facilities the gas which United proposes herein to purchase in the Ridge area from the other within applicants would enter into United's integrated pipeline system. All, or some, of the gas so purchased will be transported out of the state of Louisiana. Sunray, Buffalo and Warren have been so advised, and so understand.

It is apparent from the foregoing that the sales of gas pursuant to the contracts between United and Sunray, United and Warren, and United and Buffalo, are sales of natural gas in interstate commerce for resale and are subject to the jurisdiction of this Commission.

Upon motion made in open hearing, to conform it to the evidence, United's application was amended to include authorization to construct and operate approximately three additional miles of eight inch pipeline which would extend from the terminus of the initial 3.1 miles of line to a central point in the North Leroy Field also in the Ridge area where another meter station would be constructed. Thus there would be two central points of delivery, one in the Ridge and the other in the North Leroy Field.

The Ridge Field was discovered in October 1955. To date seven wells have been drilled in the general Ridge area,

of which 6 have resulted in gas completions and the seventh was a dry hole. The North Leroy Field lies about three miles south of the Ridge structure but within the general Ridge area. It was discovered in March 1957 with the dual completion of a well drilled by Buffalo Oil Company. Up to the present time no other wells have been drilled in the North Leroy Field.

A witness for United estimated the presently known recoverable reserves attributable to the Sunray, Warren and Buffalo contracts in the Ridge Field at 105,826,000 Mcf at 14.73 psia. He attributed to the Buffalo Oil Company's interest in the North LeRoy Field, 17,511,000 Mcf at the same pressure base. The reserves for the Ridge and North Leroy Fields combined are thus estimated at 123,337,000 Mcf. The three gas purchase contracts involved in this proceeding cover about 7,000 acres, about 4,000 of which are in the Ridge Field and about 3000, in the North Leroy Field.

[fol. 58] There is a third field in the Ridge area, namely Duson, but United does not contemplate taking gas from that field and it, therefore, is not involved here. The contracts hereinafter referred to between United and Sunray and between United and Buffalo specifically except therefrom the gas reserves underlying contracts between those sellers and Transcontinental Gas Pipe Line Corporation in the South Duson Field.

United's witness testified that the Ridge and Leroy Fields were in a rather early stage of development and that there could be expected an increased deliverability from additional drilling.

United's vice president in charge of its Gas Supply Department testified that the facilities described in United's application are reasonably necessary to enable United to receive and transport the gas which it proposes to purchase in the Ridge Field. He estimated that the cost of the initial 3.1 miles of eight inch line and the purchase meter station and separator would be $110,614 and testified that this estimate is representative of United's current construction costs in the area. The costs of these facilities would be financed out of United's current working funds. As has already been noted, it developed during the course of the hearing that

United proposes to construct and operate such other facilities as may be required from time to time to connect or take additional deliveries from wells in the Ridge area. More specifically, United proposes a further extension of the eight inch line a distance of three additional miles to a central point in the North Leroy Field and a meter station at that point and the application was orally amended to include those facilities. Since these substantially represent a duplication of the originally proposed facilities, it is assumed that the cost of these latter facilities would be approximately the same as those described in the original application.

From 263-billion in 1937, the demands upon United by its customers for gas have risen to a point where they now exceed one trillion cubic feet each year. In 1946 United delivered to its consumers some 406-billion cubic feet, in 1954 and 1955, in excess of one trillion cubic feet each year and in 1956, 1-trillion, 247-billion cubic feet. Over the past 4 years United has supplied its consumers some four and one-half trillion cubic feet of gas.

[fol. 59] Because of this growth United has found it necessary through the years to follow consistently a policy of continually adding reserves by means of new gas purchase contracts. Since its customers are taking gas at a rate in excess of one trillion cubic feet a year, it is necessary continually to replace the amount so taken. While United does not attempt to maintain a definite ratio or relationship between its total reserves and the amount which it will need to supply its demands, it does make, as nearly as possible throughout the course of a year, purchases sufficient to offset the reserves consumed. To do this an average of about 100 contracts are entered into each year. The testimony is that the purchase by United of the Ridge area gas is only one step better to meet United's customer requirements.

The applications of Sunray and Buffalo were filed under protest and were made, respectively, without prejudice to the right of the applicant to contest in any form the validity of the Commission's Order No. 174, as amended, or any part thereof, as to the Applicant or any of its sales, facilities or operations. In each such instance, however, the

application states that the Applicant is able and willing properly to make the sale in accordance with the terms, provisions and conditions of its contract and in connection therewith to conform to the provisions of the Natural Gas Act and the requirements, rules, and regulations of the Commission thereunder if Applicant should be held subject thereto.

In each such application, too, the Applicant asked that the Commission enter an order that the sale of gas as described therein is not within the jurisdiction of the Commission under the Act and that by the sale involved Applicant is not made a natural-gas company within the meaning thereof, or in the alternative, that the Commission issue to the Applicant a certificate of public convenience and necessity authorizing the sale of gas covered by the contract to the extent, and only to the extent, that such gas is transported in interstate commerce for resale for the remainder of the term of said contract and as it may be renewed or extended, and that said certificate provide for its own expiration on the expiration of the said contract term so as to authorize Applicant to cease the delivery and sale of gas thereunder at that time. Each of those contracts recited that "Applicant is informed and therefore alleges that Purchaser will transport this gas in interstate commerce." [fol. 60] Warren's application, too, recited that "Applicant is informed and believes that United Gas Pipe Line Company will cause said gas to be transported in interstate commerce for resale * * * ."

Except for the reservation relating to gas produced in the South Duson Field, each of the contracts covers all lands, leaseholds and units or parts thereof owned by seller in the area and, except for such reservation, each of the three contracts appear to be identical. Each is dated January 1, 1957, and provides that it shall remain in force and effect for twenty years from the date deliveries are commenced or the date buyer becomes obligated to commence making payments. Each provides also that in the event that either the Buyer or the Seller shall be issued a certificate which is unacceptable to it, then the contract shall terminate.

Each of the contracts provided that aside from any adjustments subsequently provided for the price paid Seller

by United per Mcf during the first five-year period would be 20.5¢, during the next succeeding five-year period 21.5¢, during the third five-year period 22.5¢, and during the fourth five-year period 23.5¢. Thereafter, while the contract remained in effect, the price was to be 24.5¢. The Buyer agreed to reimburse the Seller for gathering taxes up to but not to exceed the amount of such taxes levied at the date of the execution of the contract. In addition, Buyer agreed to reimburse Seller for ¾ths of the amount of any new or increased taxes.

It was further provided that the base price as set out above would be subject to adjustment either up or down in inverse proportion to changes in the purchasing power of the dollar, the computation to be based upon the United States Department of Labor Index of Wholesale Prices of Commodities Other Than Farm Products and Food, such prices for the period 1947-1949 being taken as 100. A formula was provided for the purposes of the calculation.

Additionally, it was agreed that Seller might request a redetermination of the price to be applicable for each of the respective periods set out above. For the purpose of redetermining the price, "the parties hereto shall determine the three highest prices, each of which shall be the weighted average price (weighted for time only) that the [fol. 61] respective contract provides will be paid during the respective period under consideration by three (3) separate purchasers (including Buyer) to producers for gas for transportation or resale in interstate commerce in arm's-length agreements between non-affiliated companies, and covering gas to be produced from fields lying wholly or partly within those Parishes in the State of Louisiana lying south of a line formed by the northern boundary of Beauregard, Allen, Evangeline, St. Landry and Pointe Coupee Parishes and west of the Mississippi River. The agreements selected shall each provide for deliveries of gas in daily quantities approximating between fifty per cent (50%) and one hundred fifty per cent (150%) of the quantities provided herein, over a similar length of time and upon substantially the same terms of quality, measurement and delivery provided herein, and the redetermined price

shall be the arithmetical average of such three (3) highest prices."

The contracts do not contain what are popularly known as "favored nations" clauses.

Buyer agreed to take or pay for whether taken or not, during each "contract year" quantities of gas at least equal to the Annual Minimum Quantity during such contract year, and during each month throughout each contract year a quantity not less than one-twenty-fourth (1/24th) of the Annual Minimum Quantity in effect for the contract year. By Annual Minimum Quantity was meant a "quantity of gas per contract year equal to the product of 45,625/1,000,000 times the quantity of Seller's gas reserves," such reserves to be determined in accordance with the provisions of the contract.

United's evidence shows that in the ordinary instance when a natural gas producer or operator tells United that he has gas for sale, (presumably in a new field which has no dominant producer) United offers "the best price we have" and that substantially ends the matter. But when it comes to "something special like this, we might dicker a little bit on the price." In this instance the dickering covered a period of about three months. In the first discussions between United and the producers United's negotiator suggested a price of 9 cents, but he then "knew that was a very foolish offer."[1] The first serious offer was 18½ cents. This, United's witness who made the offer thought was a "good round figure" and one which was competitive at the time. "However, when it came time to close [fol. 62] the deal, [something less than three months later] 18½ cents was no longer competitive." In so short a time the competition had radically changed and the witness said, "we had to make a deal at what we thought was a competitive situation at that time."

Again, United's negotiator "knew" immediately after suggesting the 18½ cent price that United would not be able to buy the gas at that price. Someone then suggested

[1] Staff counsel does not agree that this was a "foolish" offer. (Staff Brief page 13 fn.)

a price of 20 cents. United was thinking in terms of a contract with all three of the producers. If United could buy only one-third of the reserves it would not have been nearly as attractive a proposal to the buyer. As has been noted, there were 7000 acres involved and the very size of the acreage exerted a stronger influence on the price than anything else. Thus, it is seen that two or more producers combining their reserves, or acting jointly, or simply acting in unison as these producers appear to have done, may result in a deal which is more attractive to the pipeline company and more profitable to the individual producers.

Sunray, it appears, did not care to sell this Ridge gas in the package in which United wanted to purchase it and did not agree to the 20 cent proposal. United's witness said, "We wanted the gas, it was well located, it was a good reserve." Witnesses for Sunray and Buffalo said that there were others who were making offers to purchase their portion of the gas; that there were a number of factors which lead (sic) to the decision to sell the gas to United. One of the other offers provided an average price approximately the same but an initial price substantially lower. Another, offered terms identical with those of United. Other things being equal, the latter was chosen by the sellers because of a long history of satisfactory dealings between Sunray and United and the proximity of United's lines to the wells.

The initial price of 20½ cents per Mcf was agreed upon with Sunray with the understanding that United would be able to purchase all of the gas of all three producers.

The testimony was that offers of higher prices have since been heard in the area; and Sunray's witness said that he had no reason to believe that prices in the area would do anything but go up as long as there is the free play of supply and demand.

United's witness considered the price agreed upon a very "competitive" price. The basis for this conclusion was that [fol. 63] there is a contract on file with the Commission (in the Rayne Field in Southern Louisiana) in which the rate starts at 22.6 cents per Mcf plus 1.3 cents tax. There are other contracts on file commencing at 21.5 cents per Mcf plus 1.3 tax. Contracts starting with 20½ cents per

Mcf plus 1.3 cents tax, the witness said have been "approved" by the Commission.[2]

Some of the areas involved in those contracts are within 100-150 miles of the Ridge Field, and they include off-shore fields.

There are five or six pipeline companies in this area actively trying to buy gas, and in addition, two others are coming in. As recently as four years ago pipeline companies would purchase some reserves and then wait for a considerable period of time to buy more. The testimony is that that is not the way things are done today. There is keen competition between pipelines to buy gas. The prices these pipelines are willing to pay constitute the competition which United must meet. Despite this situation, however, United's witness felt that when it came to trading, both sides, that is United on the one hand and the producers on the other, "started even."

The larger the reserve available the more attractive the purchase is to the pipeline, and the higher the price which the pipeline is willing to pay for the gas. The largest reserve then, which brings the highest price, establishes the area price. United then offers the same price to the other smaller producers in the area regardless of the size of their reserves. The reasoning behind this appeared to be that "the next time we meet that small producer," he may be the one who has the largest reserve, "and he will do business with us." To which might have been added, "at the highest price such larger reserves will bring."

The testimony indicates that the price which a pipeline company is willing to pay to procure such sizeable reserves is not limitless despite the fact that five or six others are also anxious to acquire them. United's witness was emphatic in the opinion that "we couldn't have bought it any cheaper than that." He said that he thought the transaction would have fallen through if the producers had not been willing to accept the 20½ cents plus price.

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[2] The references were to Continental Oil Company et al., Docket No. G-11024, et al., Order issued June 24, 1957, Commissioner Connole dissenting; Southern Natural Gas Co. et al., Docket No. G-11234 et al., Order issued July 12, 1957, Commissioner Digby concurring and Commissioner Connole dissenting.

As has been noted, these gas sales contracts contain "re-[fol. 64] determination provisions" rather than "favored-nations" clauses. The redetermination clause[d] (sic) contained in these contracts will not trigger any of United's other contracts. United's witness stated that he did not know whether the prices set out in these contracts would trigger the "favored nations" contracts of others, but "imagined" that any such contracts would already have been triggered by contracts entered into at higher prices and filed with this Commission in recent months.

United's witness concedes that the prices here involved could be brought into play under the redetermination clauses but said that "since there are already contracts higher than this one", he did not believe that it would have any effect. He said that he did not believe that he could have bought the gas unless there had been included a redetermination clause.

Evidence subsequently presented by United was to the effect that price redeterminations had already been made with respect to all contracts United has for the purchase of gas in the Duck Lake Field (sales which appear on Schedule 3 and of the Staff's exhibit referred to below, infra, p. 11) and that there was used for the purposes of such redeterminations a price of 20.6 cents appearing in a contract for the purchase of gas in the Erath Field, and 21.4 cents arising from the Cateo contracts. Thus, a redetermined price of 22.2 cents including tax reimbursement was arrived at. It will be seen that as a consequence the operation of the redetermination clause in the independent producer contract here involved would have no appreciable effect. Of course, the Commission may find unreasonable the Erath and Cateo rates, but it may equally as well reach a similar conclusion with respect to any redeterminations made under the contracts involved in this proceeding.

As bearing upon the "question as to the highness of the initial price," which will be discussed more fully later on, the Staff presented evidence through a Supervising Engineer in the Bureau of Rates and Gas certificates. The witness sponsored a document entitled "Summary of Certain Provisions of F.P.C. Gas Rate Schedules in Specific Parishes in South Louisiana as of September 15, 1957."

The exhibit was intended to show "all the rates on file with the Commission *as* rate schedules" as of that date which had become effective.[3] It did not include contracts which had simply been filed along with Section 7 (c) applications. [fol. 65] The exhibit consisted of three schedules. The first was a summary of all the rate schedules on file with the Commission (as explained above) on the date stated in Acadia, Cameron, Iberia, Lafayette, Jefferson Davis, St. Landry, St. Martin and Vermilion Parishes, Louisiana. Among those parishes are, of course, the two in which the Ridge area lies. The reason for the choice of these eight parishes was simply to make a comparison of the rates being paid in the surrounding area as compared with those proposed in this proceeding. The Staff witness said that no contracts covering off-shore sales were on file with the Commission as *rate schedules*. The rates shown were those in effect on September 15, 1957, except for those involved in Section 4 (e) proceedings in which instances there were shown the rates which were effective before suspension or before the suspended rates became effective subject to refund. The highest rate appearing in the tabulation was 11.15 cents per Mcf.

The highest price being paid by United in each of the eight parishes included were shown to be:

Acadia	10.00¢	Jefferson Davis	10.00¢
Cameron	10.30	St. Landry	8.65
Iberia	10.00	St. Martin	10.30
Lafayette	10.00	Vermilion	10.30

Thus, the highest price being paid by United to anyone for gas in any of the eight parish areas as of September 15, 1957, was 10.3 cents per Mcf.

A second schedule was a summary of certain provisions of F.P.C. Gas Rate Schedules in specific parishes in South Louisiana providing for a rate higher than 11.15 cents per Mcf. Exclusive of those here under consideration those rates range between 12.5¢ (contract dated September 1,

[3] The witness defined "effective" as the rate which the Commission has allowed to be charged, but subject to any conditions which may be attached.

1943) and 21.4 cents (contract dated November 14, 1956). The purpose of this schedule was to show in greater detail the delivery conditions and it indicated, the Staff witness said, that there is no relationship between the delivery conditions and the price.

The highest price being paid by any buyer to Warren in the eight parish *area* was 17.8 cents per Mcf, the highest to Buffalo, 17 cents, and the highest to Sunray, 17.8 cents. Buffalo and Sunray are receiving from Transcontinental only 17 cents per Mcf for the gas the latter is buying from then (sic) in the South Duson field, which is in the Ridge area. (supra p. 4)

[fol. 66] A third schedule reflected rate schedules containing redetermination clauses for southern Louisiana which *may be affected* by the rate proposed in the within proceeding.

During the calendar year 1956, United purchased in the state of Louisiana 522,507,946 Mcf at a total cost of $55,552,501, or an average cost of 10.62 cents per Mcf at 14.9 psia. United's system-wide sales in that year were 1,246,905,960 Mcf. The total cost of the gas sold was $132,540,646.08, an average of 10.063 cents per Mcf.

The Staff witness testified[4] that:

> The purpose of Exhibit No. 4 [the document described above] is to present the only evidence presently available to the Staff of the Commission which indicates that the attachment of a rate condition to any certificate issued herein would be in the public interest. * * * The Staff does not adopt, by this presentation of evidence, a field price approach to the problem. However, in the absence of any cost data in this record, the Staff is compelled to introduce the field price study as the only evidence available to it which is relevant and material to the problem.

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[4] Objections to the questions having been sustained, Staff counsel offered to prove among other things that in "the considered judgment * * * [of the Staff witness] the precise price at which any certificates issued in this proceeding should be conditioned to, should be 18 cents per Mcf" and that the data in the Staff's exhibit "indicates that the public convenience and necessity requires the sale of gas involved in the instant proceeding at an initial price no greater than 18 cents per Mcf."

While the data thus presented by the Staff reveal that the highest rate in the area which has actually been approved by the Commission as a reasonable rate is only 11.15 cents per Mcf, substantially higher rates have been agreed upon between buyer and seller, (in presumably no less equally arm's-length transactions), in other contracts for the purchase and sale of gas in the area covered by the Staff's exhibit. A number of such contracts have been filed with the Commission as initial rates for the suspension of which by the Commission no provision is made in the Act. Some were filed along with applications for certificates of public convenience and necessity upon which the Commission has not yet acted. The Commission has in at least two instances (Southern Natural Gas Company et al. Docket Nos. G-11234 et al., order issued July 12, 1957, and Continental Oil Company et al., Docket Nos. G-11024 et al., order issued June 24, 1957, supra p. 8) issued such certificates without any condition affecting the initial price contained in the producer contracts. In one such instance the beginning price was 20.5 cents per Mcf plus 1 cent tax reimbursement and in the other, it was 21.4 cents.

[fol. 67] Consideration of the Issues

In pertinent part, Section 7 (e) of the Act provides that:

> * * * a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

It is clear from the evidence that the applicants, and each of them, is able and willing properly to do the acts and to perform the services proposed and to conform to the provisions of the Act and the Commission's rules and regulations thereunder. The question remains whether the construction and operation proposed by United and the sale by the other applicants, respectively, are or will be required by the present or future public convenience and necessity and upon what, if any, conditions.

It is contended by the applicants and conceded by Staff counsel that, aside from any questions as to the highness of the initial price at which the gas is proposed to be sold and delivered by the independent producers to United, and [fol. 67a] absent any question as to the grant of limited certificates to Sunray and Buffalo as requested, the evidence of record herein amply supports the findings necessary to the issuance of the certificates sought herein. Only two basic issues then remain. First, does the present or future public convenience and necessity require the construction and operation of the facilities proposed by United and the sales of gas proposed by the producer applicants at an initial price of 21.5 cents per Mcf inclusive of tax reimbursements, and, second, does the public convenience and necessity require that the certificates which might be issued to Sunray and Buffalo be limited in point of duration.

Before reaching those questions, however, two subsidiary issues raised by Sunray require consideration. Counsel for that applicant raises no question as to the Commission's authority to attach conditions to any certificate issued to it in this proceeding and concedes that such conditions may even authorize something different from that which is proposed in the application, but only "so long as that condition does not require investment of the capital assets of the applicant in addition to that which the company has determined to invest," and cites in support of that position Central West Utility Co. v. Federal Power Commission 247 F. 2d, 306. It is contended that: "There is no difference in that case and the instant one." With that view the examiner is unable to agree. Here the conditions would, and could, attach only to the project proposed in Sunray's application. No condition has been suggested, and none can

be conceived of, which would result in Sunray receiving anything less thereunder than it would have if the application were denied. The freedom of management to exercise its best judgment regarding the terms and provisions upon which it will devote its assets will have been exercised when it accepts or declines whatever certificate may be issued herein conditioned as to best protect, in the opinion of this Commission, the public interest.

Again, Sunray does not question that it (along with the other applicants) has the burden of establishing that that which it has proposed in its application is required by the public convenience and necessity in order to obtain a certificate therefor. But that applicant contends that one who opposes the issuance of a certificate which will authorize that which is proposed in the application on the ground that the public convenience and necessity requires the imposition of a condition which will result in something different, has the affirmative burden of establishing, by [fol. 68] substantial evidence, that which it claims is required by the public convenience and necessity. Such a contention seems to assume that the determination of the question whether the proposed service, sale, operation and construction is or will be required by the present or future public convenience and necessity is a determination entirely separate distinct and apart from the determination of the reasonableness, from the standpoint of public convenience and necessity, of the rates proposed to be charged. Even on that hypothesis the Commission has held the contrary in many instances. (cf. Alabama-Tennessee Natural Gas Company, Order July 2, 1948, 7 FPC 251, Opinion issued May 1, 1952, 11 FPC 75.) In most instances, however, a determination has been made of the public convenience and necessity treating as an element thereof the inherent reasonableness of the rates which will evolve as a result of the issuance of the certificate. That is considered to be the determination required here, and no less a burden rests upon the applicants with respect thereto than with respect to any of the other factors going to make up the public convenience and necessity. The burden of proof is upon United, Sunray, Buffalo and Warren to prove that the present and future public convenience and necessity will be served by the an-

thorization of the sales involved at the rates and upon the terms and conditions fixed in the gas purchase contracts.

That the Commission has the duty to inquire into proposed rate structures for the purpose of determining the economic feasibility of a proposed project and the economic effect upon the applicant's service of such proposed structure as well as the right to impose rate conditions consistently therewith seems never to have been questioned. The record here, however, discloses no evidence of the cost to United of the service which it proposes to render by means of the facilities here involved. Nor is there evidence that the rates which the other applicants propose to charge and the consequent cost to United would adversely affect the economic feasibility of the proposed facilities and service or the rates heretofore charged by United to its customers. The Staff witness testified that he made no calculation to determine what the effect of the proposed prices would be on United's ultimate consumers. It is clear that if there is taken into account the comparatively small volumes of gas involved here at the higher prices the difference between the average cost of gas to United before and after receiving this gas would not be of particular consequence in its effect on United's sales.

[fol. 69] The right of the Commission in pipeline certificate proceedings to weigh in the public interest the impact of specific rates upon consumers or to test the extent to which discrimination might result from the rate proposed and to impose rate conditions in certificates issued not only has administrative precedent but judicial sanction.*

Because the economic and other conditions inherent in independent producer certificate proceedings differ substantially from those in pipeline certificate cases the Commission has not deemed it prudent in every such instance to expend the time required to resolve rate issues at this stage.

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* Transcontinental Gas Pipe Line Corporation, 9 FPC 32, 50; United Gas Pipe Line Co. et al., 10 FPC 35, 69; Arkansas Louisiana Gas Co. v. Federal Power Commission, 113 F.2d, 281, 283-284; Alabama-Tennessee Natural Gas Company v. Federal Power Commission, 203 F.2d, 494, 497; Panhandle Eastern Pipe Line Company v. Federal Power Commission, et al., U.S. Court of Appeals, District of Columbia Circuit, decided December 4, 1957.

nor has it found it practical to inquire into the reasonableness of producer rates, charges and classifications in all producer certificate proceedings.

But the Act does not restrict the exercise by the Commission of that discretion which is requisite to its determination of the requirements of public convenience or necessity. It does not require that each producer-applicant must establish as an indispensible (sic) prerequisite to the grant of a certificate of public convenience and necessity to sell natural gas in interstate commerce for resale, that the price, terms and conditions under which such sale shall be consummated shall be the lowest reasonable rate, nor does it impose upon the Commission a firm duty in any certificate proceeding to prescribe as an initial rate schedule the lowest reasonable rate provided for in Section 5 of the Act. Anthony J. Tamborello, et al., Docket No. G-3045, Opinions Nos. 287 and 287-A.

In many instances the Commission has been content presently to disregard provisions of contracts which have been held not to be in the public interest relying upon its authority subsequently to pass upon the consequences thereof. (cf. Lexia Buchanan et al., Docket No. G-3864, order issued July 1, 1955; Lenor M. Josey, Inc., et al., Docket No. G-8709, order issued September 13, 1955; Albert Plummer, Docket No. G-2578 order issued September 29, 1955; Alabama-Tennessee Natural Gas Company et al., Docket No. G-2534, order issued September 23, 1955; Anthony J. Tamborello, Opinion No. 287 issued November 23, 1955.)

[fol. 70] In Alabama-Tennessee Natural Gas Company et al., Docket No. G-2534 interveners contended that the initial rate sought in a certificate proceeding by the independent producers was too high. The price was determined by arm's-length bargaining. While the Commission concluded that the initial cost of gas from the proposed southeastern Louisiana source was not so high as materially to affect the overall cost of service of the buying pipeline, it warned " * * * our action herein is not to be construed as an approval or disapproval of the 17-cent initial rate."

In that case, interveners also contended that "since the escalator clauses contained in the independent producer contract are of the type which were found not in the public interest in the Commission's Order 174-B * * * the Commission should grant their motion to strike the independent producer contracts from the record in these proceedings. The clauses complained of can only become operative in the event of a future filing proposing an increase in rates over and above the initial rate."

It is, however, necessary for the Commission to have before it in deciding a producer certificate application the basic facts as to the rates to be charged. If on the basis of such evidence, it appears to the Commission that examination into the justness and reasonableness of a specific rate of an independent producer in a certificate proceeding is required, there is ample authority in the statute for appropriate inquiry to be made in that proceeding. Anthony J. Tamborello, supra.

Staff counsel raises the question whether the instant proceeding is one in which the Commission should exercise its discretion through the attachment of a rate condition in accordance with its decision in Cities Service Gas Company et al., Docket No. G-2569 et al. (Opinion No. 288, issued November 28, 1955)

In that opinion, the Commission said:

In this, a proceeding upon a certificate application, Signal as applicant-seller has the burden of proving all elements of its application so that we may conclude that the service proposed is or will be required by the present or future public convenience and necessity. A vital element of such proof is concerned with the rates proposed.

[fol. 71] In that instance the applicant's proposed rate was in excess of the "going field price" and it was contended by other parties that to permit the sale at that price would cause a radical disturbance of the status quo and result in great harm to the customers of public utilities purchasing gas in the area as well as injury to the public utilities them-

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[6] Chairman Kuykendall and Commissioner Digby dissenting.

selves. In that proceeding the Commission said "* * * a precise determination is not required here since we do not purport to determine the just and reasonable rates within the meaning of Section 4."

It had there been suggested that rather than attach a condition to the certificate the Commission could immediately commence a rate investigation under Section 5(a) of the Act. But it was pointed out by the Commission that such a method of approach would in the latter event place upon the Staff the burden of proving that the applicant's rate or rates are unreasonable, and that it would entail a delay in the establishment of rates not inconsistent with the certificate. In its opinion (No. 288 supra) the Commission went on to say:

In the face of admitted injury to many parties in this proceeding, we are convinced that a rate structure which has prevailed in this area for some time should not be disturbed without a showing more substantial than appears on this record that such a change is necessary and that the level to which the rates are proposed to be changed is itself just and reasonable. We find that the certificate applicants herein have failed to demonstrate that a rate level of 12 cents per Mcf is necessary in the public interest or that the public convenience and necessity which requires the issuance of this certificate dictates a finding that a rate of 12 cents is necessary to insure the economic feasibility of the project."

Upon proceedings in review of the action of the Commission, Signal rejected the binding effect on it of the cases heretofore cited (supra p. 15), pointing out that those cases concern pipelines and that Signal is an "independent producer." Upon review the United States Court of Appeals for the Third Circuit said:

* * * We fail to see how these differences are relevant to the issue of the Commission's power to condition certificates under Section 7(e). Signal Oil and Gas Co. v. Federal Power Commission, 238 F.2d, 771, 775.

[fol. 72] In Natural Gas Pipe Line Company of America, Opinion No. 299, issued December 4, 1956, the Commission said:

In our opinion No. 288 [supra] * * * we made it clear that the particular circumstances presented in each case are of decisive importance in determining whether a condition like that imposed in the Signal case should be attached to the issuance of a certificate to a producer.[7] These circumstances include the extent to which a convincing showing has been made that as a result of the price proposed, the prices for other sales in the area in question will be increased, keeping in mind such relevant factors as the kind and quantity of gas sold, the degree of competition present in the area, and the extent to which the producer contract in question resembles the other gas sales contracts in the area.

In its order issued July 12, 1957, in Southern Natural Gas Company, et al., Docket Nos. G-11234 et al., supra, the Commission[8] issued certificates of public convenience and necessity to Southern Natural for the construction and operation of certain facilities, and to six independent producers of natural gas to sell gas to Southern Natural for transportation and sale in interstate commerce without imposing conditions limiting the initial rates to be charged.

It appears that in Continental Oil Company et al., Docket Nos. G-11024 et al., the initial price was 22.4 cents per Mcf (including one cent per Mcf for Louisiana gathering tax) escalating 2 cents per Mcf every four years. That price was higher than Tennessee was paying under any other gas purchase contract. It was there contended that if the proposed rate were allowed to stand it would establish a higher-price plateau in a new area to the detriment of the pipeline's customers. The Commission found that the record contained insufficient evidence on which to base a finding that the public convenience and necessity required the sale of the gas at the particular rate level there proposed. In an order, dated April 22, 1957, issuing a temporary certificate the Commission concluded that, in the public interest, this crucial sale should not be permanently certificated unless the rate level has been shown to be in the

[7] Footnote 9 omitted here.

[8] Commissioner Digby concurring and Commissioner Connole dissenting.

public interest. Compelling reasons prevented the Commission from postponing making the volume of gas available, however, until such time as the determination had [fol. 73] been made. The Commission, therefore, issued only a temporary certificate. Thereafter, upon application for rehearing and reconsideration, the Commission on June 24, 1937, issued a permanent certificate.[9] Concurrently therewith, however, the Commission instituted an investigation of the rates and charges of one of the independent producer applicants and called attention to the fact that similar investigations had already been instituted with respect to the rates of the other two.

It is clear from the evidence presented herein that the prices agreed upon were arrived at in arm's-length transactions, that the prices which the independent producers propose herein to charge United for gas in the Ridge and North Leroy Fields are considerably higher (in fact about double) any price paid by United in southern Louisiana which has actually been approved by this Commission, that such price is more than 4 cents per Mcf higher than that being received by Sunray and Buffalo in the South Duson Field in the same producing area, that such price is as high as any price yet agreed upon between any buyer and any seller in the South Louisiana area. Furthermore, it should be noted that the period escalation clauses contained in the contracts have been found by this Commission (in order No. 174-B) to be contrary to the public interest.

The Commission has made it clear that the reasonableness of independent producer rates cannot be established simply by producing contracts entered into at arm's length and showing that the rates are no higher than those charged by others in the area. It would seem that the converse would also be true. That is to say, the mere fact that the rates are higher than those United is paying in the area, or higher than the producers are receiving in the area, would not seem to establish the fact that such rates are unreasonable. Nor would it seem to follow that the inclusion of such rates in the contracts would necessitate a finding that the

[9] Commissioner Connole dissenting.

present and future public convenience and necessity do not require the issuance of the certificate sought.

It cannot be said here, as it was in the *Signal* opinion, supra, that to issue the certificates sought herein by the independent producers without imposing thereon a condition limiting the price to something less than that fixed in the contracts will cause a radical disturbance of the status [fol. 74] quo and result in great harm to the customers of the pipelines purchasing gas in the area, or to those pipelines.

Neither can it be said here, as was contended in the *Cato* proceeding (see the Commission's order of April 22, 1957) that if the rate here proposed were allowed to stand it would establish a higher-price plateau in a new area to the detriment of consumers.

It is concluded, therefore, that the construction and operation of the facilities which United herein proposes to construct and operate and the sales of gas by Sunray, Buffalo and Warren to United in the Ridge area are or will be required by the present or future public convenience or necessity; and that there should not be imposed upon the certificates issued to the independent producer applicants any condition or conditions fixing maximum rates to be charged thereunder. On the other hand, the finding cannot be, and is not, made that either the initial or future rates set out in the gas purchase contracts between United and the several independent producers are just and reasonable within the meaning of Sections 4 and 5 of the Natural Gas Act.

It should be pointed out, too, that unlike the Commission, the presiding examiner does not have the authority to institute investigations for the purpose of determining, as is contemplated by Section 5(a) of the Act, just and reasonable rates.

As has already been recited (supra p. 5), as distinguished from United and Warren, Sunray and Buffalo seek certificates limited in duration to the remainder of the term of the contract in each instance and as such contract may be renewed or extended. Section 7(b) of the Act provides in pertinent part that:

No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained * * *

Section 7(b) is clearly not intended to be a restriction upon the powers granted in Sections 7(c) and 7(e), Sunray Mid-Continent Oil Co. v. Federal Power Commission, 239 F.2d, 97, 101. (Remanded by United States Supreme Court [fol. 75] for reconsideration on the merits. 353 U.S. 944.) Nor can the existence of a contract containing an expiration date serve as a restriction on the Commission's powers, ibid. Section 7(b) was obviously meant to afford the Commission a subsequent opportunity, should it so desire, to determine at some date in the future, as the circumstances might require, whether the public convenience and necessity then permits the service which has been authorized and instituted to be discontinued. That the public convenience and necessity *may not* then permit such abandonment goes without saying.

It is conceivable that in some cases, legal, physical, financial or other factors may be shown to exist which warrant conditioning certificates as to time. (Op cit) But for the Commission presently to conclude that the public convenience and necessity will upon the expiration of the contract permit the discontinuance of the service would seem to require most persuasive proof.

Testimony on the point was given by a witness for Sunray and for Buffalo. Sunray's manager of gas sales gave as the reason why his company was seeking a certificate coextensive with the time of the contract was "because that is the basis under which we contracted for this sale." One of the factors which Sunray took into account in deciding to enter into such a contract was the term thereof. "It is, in Sunray's opinion," the witness said, "unreasonable to expect it to accept a certificate which, in effect, replaces the term agreed upon with one of indefinite or unlimited duration without adequately compensating for the effect of such change by varying other conditions and obligations of that contract."

In order properly and adequately to protect the interests of its stockholders, Sunray endeavors to obtain the maximum control and disposition of its natural gas. In order to do so, the company would prefer, it appears, to sell its gas on a day-to-day basis. The policy to maintain "the maximum control over the disposition of this valuable asset of the company by the additional means of short-term contracts is determined by the inability to predict accurately the effect of such factors as supply and demand, the economy of the country" and future discoveries of reserves. Sunray feels that it should be free from the obligations of this control and the certificate when the term of the contract expires.

[fol. 76] It is not inconceivable, the witness said, that it may prove uneconomical to develop the additional reserves in the field. By limiting the term of the contract the company has sought to insure that there will not be an uneconomical disposition of the company's assets.

The witness for Buffalo similarly testified that his company felt that it should not tie up its unknown reserves for an indefinite length of time.

It is believed that the evidence presented by Sunray and Buffalo may be fairly summarized by saying that those applicants would prefer not to be subject to regulation. But Congress, this Commission and the Courts have decreed otherwise.

This examiner is not persuaded that the present or future public convenience and necessity require anything other than a certificate subject to the provisions of the Natural Gas Act.

Additional Findings And Conclusions

Upon consideration of the entire record herein, the evidence adduced and the briefs filed, it is found and concluded, in addition to the findings and conclusions heretofore set out, that:

(1) United Gas Pipe Line Company the applicant in Docket No. G-12270 is a natural-gas company within the meaning of the Natural Gas Act.

(2) Sunray Mid-Continent Oil Company, Buffalo Oil Company and Warren Petroleum Company, applicants in Docket Nos. G-12211, G-12214 and G-12215, respectively, are now, or will become upon the commencement of the sales of natural gas in these proceedings proposed, independent producers of natural gas as defined in this Commission's regulations, are or will then be engaged in the sale of natural gas in interstate commerce for resale for ultimate public consumption, and each of them is or will then be, therefore, a natural gas company within the meaning of the Natural Gas Act.

(3) The facilities which United proposes in its application in Docket No. G-12270, as orally amended in open hearing, to construct and operate, namely, approximately [fol. 77] 3.1 miles of 8-inch pipeline beginning at a point of interconnection on United's existing 10-inch line near Milepost 110 in Lafayette Parish, Louisiana, and extending in a southwesterly direction to a central delivery point in the Ridge Field, a meter station and separator to be located at that point, approximately 3 miles of 8-inch pipeline continuing from that point to a central delivery point in the North Leroy Field, and a meter station and separator at the latter point, and facilities appurtenant to the foregoing, are to be used for the transportation and sale of natural gas in interstate commerce and such facilities are subject to the requirements of Section 7 of the Natural Gas Act.

(4) The sales proposed to be made by the independent producers named in Finding (2) above, all as more fully set forth in the applications filed in Dockets Nos. G-12211, G-12214 and G-12215, will be made to United for the purpose of resale by United in interstate commerce, and such sales are or will be subject to the provisions of Section 7 of the Natural Gas Act.

(5) United is a qualified applicant within the meaning of Subsection (e) of Section 7 of the Act and is able and willing properly to do the acts, construct and operate the facilities proposed and conform to the provisions of the

Natural Gas Act and the requirements, rules, and regulations of the Commission thereunder.

(6) Sunray, Buffalo and Warren, the independent producers named in Finding (2) are and each of them is a qualified applicant within the meaning of Section 7(c) of the Act and each of them is able and willing properly to do the acts and perform the services proposed and conform to the provisions of the Natural Gas Act and the requirements, rules and regulations of the Commission thereunder.

(7) The construction and operation by United of the facilities described in Finding (3) and the services described in Finding (4) proposed to be rendered by the independent producers named in Finding (2) are, or will be, required by the present or future public convenience and necessity and certificates therefor, as provided by Section 7(c) of the Act, should be issued as hereinafter ordered upon the terms and conditions contained in this order, which terms and conditions are reasonable and required by the public convenience and necessity.

[fol. 78] (8) The present or future public convenience or necessity does not permit the issuance to Sunray or Buffalo certificates limited in duration and providing for their own expiration upon the expiration of the contract term so as to authorize such applicants to cease the delivery and sale of gas thereunder at that time.

ORDER

Wherefore, It Is Ordered, subject to review by the Commission that:

A. A certificate of public convenience and necessity be and the same is hereby issued authorizing United to construct and operate the facilities described in Finding (3) above for the transportation and sale of natural gas to be purchased by United from Sunray, Buffalo and Warren in the Ridge and North Leroy Fields, in Lafayette Parish, Louisiana, in accordance with the gas purchase contracts entered into on January 1, 1957 between United and the

independent producers described in Finding (2) above, upon the terms and conditions of this order.

B. Certificates of public convenience and necessity be and the same are hereby issued to the independent producer applicants referred to in Finding (2) above authorizing the sale of natural gas by them to United referred to in Paragraph A hereof, together with the construction and operation of any facilities subject to the jurisdiction of this Commission necessary therefor, subject to the terms and conditions of this order.

C. The certificates issued in Paragraphs A and B hereof shall be accepted in writing under oath by a responsible official of the respective applicants within 30 days from the issuance of this order.

D. The certificate issued to each of said applicants is not transferable and shall be effective only so long as each of said applicants continues the acts or operations hereby authorized in accordance with the provisions of the Natural Gas Act, and the applicable rules, regulations and orders of the Commission.

E. The grant of the certificates herein shall not be con-
[60,179] strued as a determination of the justness or reasonableness of the initial or subsequent prices contained in the gas purchase contracts, nor as a waiver of the requirements of Section 4 of the Natural Gas Act, or of Section 154 of the Commission's Rules and Regulations thereunder requiring the filing of rate schedules for the service herein authorized; and is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against the applicants. Further, the action in this proceeding shall not foreclose nor prejudice any future proceeding or objection relating to the operation of any price or related provision in the gas purchase contracts herein involved.

F. The general terms and conditions set forth in paragraphs (a), (b), (c)(i), (3)(ii), (c), (3), (c)(4), and (c) of Section 157.20 of the Commission's Rules and Regula-

tions including the Rules of Practice and Procedure, shall attach to the issuance of the certificate granted in paragraphs A and B hereof, and to the exercise of the rights granted thereunder.

Edward B. Marsh, Presiding Examiner

Filed: February 3, 1958
Issued: February 3, 1958

BEFORE THE FEDERAL POWER COMMISSION

ORDER MODIFYING AND AFFIRMING INITIAL DECISION OF PRESIDING EXAMINER—Issued May 9, 1958

These proceedings, which arose under Section 7(c) of the Natural Gas Act (Act), are before us on exceptions to the presiding examiner's initial decision issued herein on February 3, 1958. They involve applications for certificates of public convenience and necessity filed by three independent producer natural-gas companies, Sunray Mid-Continent Oil Company (Sunray), Buffalo Oil Company (Buffalo), and Warren Petroleum Corporation (Warren), and one pipeline natural-gas company, United Gas Pipe Line Company (United). The producers request the Commission to authorize sales of natural gas from the Ridge Area in Lafayette and Vermillion Parishes, in southern Louisiana, [fol. 80] to United; and United requests permission to build some six miles of 8-inch line and related facilities to receive delivery of the gas. The initial proposed price for the sales to United is 20.5 cents per Mcf, plus 1 cent for tax.

The presiding examiner held that the requirements of public convenience and necessity had been met with respect to the authorizations requested and that certificates should be issued therefor. On the two main issues in the case he held, first, that no rate condition should be attached to the producers' certificates, rejecting staff's recommended condition which would reduce the price to 18 cents. Second, he held that the certificates issued to the producers should be of unlimited duration, rejecting the requests of Sunray and Buffalo[1] that their certificates should be permitted

[1] Warren does not make such a request.

to expire automatically in accordance with the provisions of the gas sales contracts.

We agree with these determinations of the presiding examiner and conclude that his decision should be affirmed. As to attaching rate conditions to the producer's certificates, we are of the view that this case comes within our holdings in opinion No. 309 in the *Seaboard* case.[1] The evidence and arguments relied on by staff counsel to support the imposition of rate conditions here are similar to those discussed in *Seaboard* and are subject generally to the infirmities detailed in that opinion. Under the principles laid down there and in the *Signal* case,[2] there is no substantial evidence to establish that the producers' proposed price is excessive or that a rate condition is otherwise required by the public convenience and necessity. Nor is there substantial evidence to support a finding that staff's proposed condition is reasonable within the meaning of Section 7 (e) of the Natural Gas Act. Further, as we said in the *Seaboard* case (mimeo. ed., p. 10):

> The proper administration of the Act demands a close adherence to the intended scheme of the statute; and the several objectives of the Act can best be achieved by following the channels specifically designed for the attainment of each. So that, although in a proper case the element of price may be considered in passing on a certificate application under the Act, the principal place for the consideration of matters of rate level is in rate proceedings.

Since the examiner's decision was issued prior to our [fol. 81] *Seaboard* opinion, that decision should be modified to accord herewith and as so modified should be affirmed on this issue.

Likewise, we conclude that the presiding examiner correctly rejected the producers' request that the certificates issued them be of limited duration, conforming to the term of the sales contract. Whether a certificate should be issued under Section 7 for limited duration and if so, the

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[1] Opinion No. 309, issued March 31, 1958, In the Matters of Seaboard Oil Company, Operator, docket No. G-11970, et al.

[2] Signal Oil & Gas Co. v. F.P.C., 238 F.2d 771 (CA3), cert. den., 353 U.S. 923.

extent of the term, are questions to be determined in application of the statutory standards of this section, including the requirements of public convenience and necessity. The presiding examiner holds, in essence, that the evidence adduced by Sunray and Buffalo in this case does not substantially support the issuance of certificates of other than unlimited duration. This holding also we affirm.

The issues raised by the parties' exceptions and not discussed here are generally, to the extent material, dealt with in the presiding examiner's decision. All such exceptions are without substantial support in fact or reasonable basis in law. We find no merit to Sunray's claim that in issuing a certificate we cannot depart from a time limitation proposed by an applicant. Section 7 (e) permits the attachment to certificates of such reasonable terms and conditions as public convenience and necessity require. The conclusion of the examiner on this point is supported by the observations of the Tenth Circuit in Sunray Mid-Continent Oil Co. v. F.P.C., 235 F.2d 97 (1956), reversed and remanded on other grounds, 353 U.S. 944 (1957). The Tenth Circuit held that while the Commission has authority to issue certificates of limited duration, it is not required to do so. If the Commission is to have the power to protect the public, the Court said, it must be able to prevent abandonment, and the burden to support a limitation of term in a certificate is upon the applicant. In addition, Section 7 (e) empowers us to authorize "the whole or any part" of the operation, sale, service, etc., covered by the application. Where, as here, the applicant has failed to sustain its proposals in their entirety, we may properly authorize only the proposals sustainable under the facts and the law.

Since all the material issues in this case are fully discussed in the parties' briefs, the presiding examiner's initial decision and the exceptions thereto, no useful purpose would be served by affording oral argument and Sunray's motion therefor should be denied.

[fol. 82] The Commission orders:

(A) Consistent with this order, the initial decision of the presiding examiner issued February 3, 1958, in the

above-entitled proceedings is hereby affirmed as of the date of issuance of this order and the exceptions to that decision are hereby denied.

(B) Sunray's motion for oral argument filed herein on February 24, 1958, is hereby denied.

By the Commission: Chairman Kuykendall and Commissioner Stueck concur in the result for the reasons set forth in their separate statements issued with Opinion No. 309, In the Matters of Seaboard Oil Company, Operator, et al., Docket Nos. G-11970, et al. Commissioner Connole concurring in part and dissenting in part.

Joseph H. Gutride, Secretary.

CONNOLE, Commissioner, *concurring* in part, *dissenting* in part:

The prices which the independent producers propose herein to charge United for gas in the Ridge and North Leroy Fields are considerably higher (in fact about double) any price paid by United in southern Louisiana which has actually been approved by this Commission. Such price is more than 4 cents per Mcf higher than that being received by Sunray and Buffalo in the South Dixon Field in the same producing area. Such price is as high as any price yet agreed upon between any buyer and any seller in the south Louisiana area.

In the face of these facts the burden on Applicants to show that the public convenience and necessity requires the sale at these prices is heavy. The Examiner concluded, quite inevitably I believe, that as a matter of law this burden rested on the Applicants, that the burden was not on this Commission or any intervenor to prove that the public convenience and necessity did not require it. With this conclusion I am in agreement.

For reasons which no longer have any novelty, and I fear, have little persuasive force among my brothers, I dissent fol. 31 from the assertion of majority that Applicants have discharged their burden on this record. What these reasons may lack in novelty or persuasiveness, however, I believe they more than make up in force and validity. Consider my dissent to the order in Re The Superior Oil Company, et al., G-12121 et al., issued today, for an example of

the consequences of disregarding the principles I urge and the practical necessities which demand their adoption if meaningful regulation is to continue. See also my dissent in Re Seaboard Oil Company, et al., G-11970 et al. for a fuller statement of my position.

I agree that the Examiner correctly rejected the producer's request that the certificates issued to them be of limited duration, conforming to the terms of the sales contract. With as much of the order that so concludes, I concur.

William R. Connole, Commissioner.

BEFORE THE FEDERAL POWER COMMISSION

APPLICATION FOR REHEARING AND RECONSIDERATION OF COMMISSION ORDER ENTITLED "ORDER MODIFYING AND AFFIRMING INITIAL DECISION OF PRESIDING EXAMINER".

Comes Now Sunray Mid-Continent Oil Company, "Petitioner," and files this application for rehearing and reconsideration of the order issued by the Commission in the above entitled proceedings on May 9, 1958, which order is entitled "Order Modifying and Affirming Initial Decision of Presiding Examiner" and prays that the Commission vacate or, in the affirmative, modify said order insofar as it applies to Sunray Mid-Continent Oil Company in its said Docket No. G-12211 as prayed.

I. This application is filed pursuant to Section 19 (a) of the Natural Gas Act and Section 1.34 of the Commission's Rules of Practice and Procedure.

II. The exact legal name of the Petitioner is: Sunray Mid-Continent Oil Company P. O. Box 2039, Tulsa 2, Oklahoma.

Sunray Mid-Continent Oil Company is a corporation organized under the laws of the State of Delaware with its principal place of business in Tulsa, Oklahoma. The names and addresses of persons to whom communications are to be sent concerning this matter are: James C. Denton, Jr. [fol. 84] Sunray Mid-Continent Oil Company, P. O. Box 2039, Tulsa, Oklahoma, Attorney for Sunray Mid-Continent

Oil Company and Dale E. Doty, Doerner, Rinehart, Stuart & Clammer, 1001 Connecticut Avenue, N.W. Washington 6, D.C.

III. Petitioner in this docket applied for a certificate "authorizing the sale of gas covered by the contract described . . . for the remainder of the term of said contract and as it may be renewed or extended" and, to make clear its prayer, it prayed further "and that said certificate provide for its own expiration on the expiration of the said contract term so as to authorize applicant to cease the delivery and sale of gas thereunder at that time. . . ." The referenced contract is that of January 1, 1957, providing for a sale to United Gas Pipe Line Company of gas produced from the lands, leaseholds and units, or parts thereof, now owned by seller in an area of approximately 33 square miles in both Lafayette and Vermilion Parishes, Louisiana, in which at this time the only proven gas reserves are located in what is denominated the "Ridge Field," in Lafayette Parish, Louisiana. The contract provides for the sale of gas only for a 20-year term, with the proviso that if buyer is unable to take delivery of the quantity of gas specified as sold hereunder in the 20-year term by reason of the gas being required for cycling, repressuring or pressure maintenance operations, the term shall be extended for a period of time sufficient for buyer to be able to take delivery of the additional gas so that buyer will receive the full contract quantity (Contract, Article XIV, at page 30). The contract quantity is based on the proven gas reserves. The contract recognizes that additional reserves may be discovered in the 33-square-mile area and, with certain conditions precedent, provides for the inclusion under the terms of this contract of such additional gas reserves. On the redetermination (enlargement) of the proven gas reserves for the purposes of the contract quantity, however, no retroactive effect is given to the newly discovered or added reserves (Contract, Article IV, at page 12). The contract quantity is fixed at 4.5625% per year of seller's gas reserves (Contract, Article I, at page 4).

Therefore, the contract is for a stated quantity of gas to be produced during a specific term of years and the contract recognizes that there may and probably will be re-

serves of gas in the described areas owned by seller which [fol. 85] are in excess of the total contract quantity and which are not intended to be sold under this contract.[1] Petitioner's application is for a certificate and authority to sell only this quantity of gas, the prayer being framed in the terms of the length of the sale since the total contract quantity is determined by the term or life span of the contract.

The decision of the Presiding Examiner, issued February 3, 1958, in effect held—

1. That Section 7 (b) of the Natural Gas Act requires that the Commission issue a certificate of public convenience and necessity without time limitation (Mimeo, pages 20 and 21); and

2. That there are no legal, physical, financial or other factors which have been shown to exist which are sufficient to warrant "conditioning" the Sunray certificate so that it is *limited in time* to the term of the contract (id., page 21).

The order to which this petition is addressed was issued by the Commission on May 9, 1958, and modified in certain regards not here in issue the Examiner's decision and affirmed the Examiner's decision as correct, adding that

[1] The contract only requires buyer to take the contract quantity which is 4.5625% per year of the gas reserves. The buyer, however, may call for deliveries of gas up to 150% of the contract quantity. Therefore, if the Ridge Field is the only gas reserve developed in the 33-square-mile area, buyer is only required to take 91.25% of the Ridge gas reserve as now established during the term of the contract. However, buyer has the right, but not the obligation, to take at a maximum rate of 6.84375% per year which would exhaust the presently established recoverable reserves in less than 15 years. But, as shown above, much more than Ridge Field is here certificated and, when the contract recoverable reserves are redetermined upon an enlargement, the fixed contract rate will only apply prospectively to the remainder of the 20-year term so that, to cite an extreme example, if another "Ridge Field" reserve is discovered in the 19th year of the contract, the contract only requires United to take 4.6% of those reserves and United could not take more than 6.8% so that, at the end of the term of the contract, there would remain from 93 to 95% of that newly discovered "Ridge Field."

Section 7 (e) permits the conditioning of a certificate and that the Commission must be able to prevent "abandonment" (sic). The opinion also added that the burden of supporting a limitation of term in a certificate is upon the applicant and that the Commission is only authorizing a part of the proposal of applicant because applicant has filed (sic) to sustain its proposal in its entirety.

[fol. 86] IV. Argument

As grounds for this application for rehearing and reconsideration, Petitioner states as follows:

A. The Commission is without authority to issue a certificate to an applicant authorizing more than the whole or some part of the sale covered by the application for certificate of public convenience and necessity and the Commission erred as a matter of law in so doing herein.

Section 7 (e) of the Natural Gas Act requires that the Commission issue a certificate to this Petitioner authorizing "the whole or any part" of the sale covered by the application if the Commission finds that Petitioner is able and willing properly and legally to perform the sale proposed and that the sale proposed, "to the extent authorized by the certificate," is or will be required by the present or future public convenience and necessity. If the Commission does not do this, the section provides that the application shall be denied. The Commission by the section is also given the power to attach conditions to the certificate if the conditions are reasonable and may be required by the public convenience and necessity.

In the instant case, the Commission has issued a certificate which would require the applicant to sell a larger quantity of gas than applicant is obligated to sell under its contract with purchaser and a larger quantity of gas than applicant has applied for authority to sell. Additionally, the Commission has issued a certificate which would require the applicant to sell gas for a longer period of time than the period for which applicant has obligated itself by contract to sell gas and for a longer period of time than applicant has requested be certified for such sale.

The Commission has accordingly exceeded its authority under Section 7 (e) of the Natural Gas Act. Since the only authority that the Commission has for the issuance of a certificate in the instant case is that contained in Section 7 (e), the Commission has exceeded its authority under the Natural Gas Act and its order issuing said certificate is in error as a matter of law.

[tol. 87] B. The Commission erred as a matter of law in conditioning the certificate applied for so as to require enlargement of the investment of the capital assets of applicant over that proposed by applicant and that required by the applicant's contract for sale of gas.

As more particularly stated hereinbefore under subdivision III, it is patently clear that Petitioner has applied for a certificate to sell the contract annual quantity of gas for only a 20-year period. It is an undisputed fact that the certificate issued by the Commission's order is one which would require the Petitioner to sell the annual contract quantity of gas for more than 20 years and, thus, that the certificate offered would require Petitioner to sell more of its gas than Petitioner proposed to sell. Therefore, this order would require Petitioner, as a condition precedent to selling gas in interstate commerce, to give up control of the capital assets of the company which are not the subject of the contract which is the basis of the sale in interstate commerce and which capital assets Petitioner has not offered before the Commission for sale in interstate commerce. Thus, we submit, the Commission is as much without authority to do as to require an applicant, on pain of not receiving a certificate as applied for, to enlarge his physical facilities beyond those which the management of applicant has determined to devote to use in interstate commerce. In the Matter of Panhandle Eastern Pipe Line Co., et al., 15 F.P.C. 46 (1956) and Central West Utility Co. v. Federal Power Commission, 247 F. 2d 306 (U.S. Court of Appeals, 3d, 1957). In each case, the Commission's condition would require the investment of additional capital assets of the company. As pointed out in the reply brief of Petitioner, filed with the Examiner on November 15, 1957, the Commission has heretofore

taken the position that the management of a natural gas company is free to exercise its best business judgment regarding the terms and provisions upon which it will devote its assets to jurisdictional service (Commission Brief, p. 11, in Oklahoma Natural Gas Co. v. Federal Power Commission, No. 13,783, U.S. Court of Appeals for Dist. of Columbia) and such acknowledgement was specifically in recognition of the decision of the United States Supreme Court in United Gas Co. v. Mobile Gas Corp., 350 U.S. 332, that the Natural Gas Act evinces no purpose to abrogate private rate contracts as such but permits the relationship between the parties to be established initially by contract.

[fol. 88] C. The Commission erred as a matter of law in conditioning the certificate issued to applicant in the absence of any evidence or findings that the public convenience and necessity may so require.

As recited above, while Petitioner only applied for and proposed a sale of the contract quantity of gas for a 20-year period, the Commission has issued a certificate to this Petitioner for a sale of more than the contract quantity of gas and for a period of more than 20 years. Since this change in the proposal of Petitioner was not instigated by Petitioner, the change must be denominated a condition to the certificate. Under the last sentence of Section 7 (e) of the Natural Gas Act, the authority of the Commission to condition a certificate is limited to a condition which the Commission finds may be required by the present or future public convenience and necessity.

There is no finding made by the Commission that the public convenience and necessity requires the certificate proposed be conditioned as it has been in the issuing order of May 9, 1958. It is respectfully submitted that, if there is such a finding, it is a finding that as matter of law Section 7 (b) requires that a certificate issued under Section 7 (e) must be a certificate in perpetuity because, if the certificate is of limited duration, the Commission will be unable to prevent "abandonment." (Sic, Mimeo order, p. 3.) This legal conclusion is, of course, erroneous. Sunray Mid-Continent Oil Co. v. Federal Power Commission, 239

F. 2d 97, 353 U.S. 944. In addition, there is no proposal yet before the Commission that this Petitioner abandon any part, either in quantity or term, of its proposed sale of gas to purchaser. To the contrary, Petitioner is affirmatively offering and agreeing to obligate itself to make the sale proposed. There is no claim from this Petitioner that it is not required to comply with Section 7 (b) of the Natural Gas Act if it desires to abandon any portion of the sale, either as to quantity of gas or length of the sale, that it now proposes be certificated. Quite simply, Section 7 (b) of the Natural Gas Act is not involved in this proceeding in any manner.

In addition, it is fundamental that such a finding, which imposes a condition, must be based on substantial evidence. There was no evidence of any kind offered in this [fol. 89] consolidated hearing that the present or future public convenience and necessity might require a sale of more gas or a sale for a longer period than that proposed by Petitioner in its application.

Therefore, the Commission erred as a matter of law in so conditioning the certificate issued to Petitioner therein.

D. The Commission erred as a matter of law in requiring that applicant for a certificate of public convenience and necessity in a hearing under Section 7 (e) of the Natural Gas Act affirmatively bear a negative burden of proof: that the public convenience and necessity will not require the conditioning of the certificate applied for by that applicant.

We respectfully submit, as aforesaid, that the certificate issued to this Petitioner by the Commission authorizes the sale of the quantity of gas and for the period of time that Petitioner proposes and, in addition, it also offers and requires a sale of additional gas and for an additional period of time than that proposed by Petitioner. The whole must include all of its parts. Therefore, the Commission cannot now take the position that there has been a failure by applicant to bear the burden of proof necessary under Section 7 (e) of the Natural Gas Act to support a certificate to sell the annual contract quantity of gas for 20 years.

However, the order of the Commission issuing the certificate states that:

> "The burden to support a limitation of term in a certificate is upon the applicant."

To the extent that the certificate issued requires a sale of more gas and for a longer period of time than that proposed by Petitioner, the certificate has been conditioned. Since this condition was not proposed by this Petitioner, it must have been proposed by somebody else. There being no opponent to Petitioner except the Staff of the Commission, it must follow that either Staff Counsel or the Commission is the proponent of the condition.[1] Section 7 (e) of the Natural Gas Act only requires as a burden of proof that the *sale proposed by the applicant* be found required [fol. 90] by the present or future public convenience and necessity (and that applicant is able and willing lawfully to perform the sale). Section 7 (c) of the Administrative Procedure Act states that the proponent of a rule or order shall have the burden of proof. As hereinabove indicated, we respectfully submit it cannot be disputed that the fact that the Commission issued the certificate to the extent of the sale proposed by Petitioner, the Commission would have to admit that the Petitioner has met its statutory burden of proof.

The question then raised is who bore the burden of proof as to the condition (requirement of sale of additional volumes of gas for an additional period of time)?

The Committee Report on the Administrative Procedure Act with reference to Section 7 (c) states:

> "That the proponent of a rule or order has the burden of proof means not only that the party initiating the proceeding has the general burden of coming

[1] Staff Counsel took no position on this matter in the hearing (T., p. 7). The position was first taken in the Brief of Staff Counsel filed after the proceeding was concluded (also see Smray Reply Brief, p. 13). Thus the Commission's order now states that Petitioner was required affirmatively to go forward in the hearing and bear the burden of *dis*proving a counter-proposition that was not made or put in issue in the hearing.

forward with a prima facie case but that *other parties, who are proponents of some different result, also for that purpose have a burden to maintain.*" Sen. Doc. No. 248, 79th Cong., 2d Sess. 208, 270 (1946). (Emphasis supplied.)

As indicated elsewhere, there was no evidence offered in this proceeding in support of the condition.

The order of the Commission, as cited and quoted above, would decree upon Petitioner a burden of proving, in this case, that specifically no other or additional sale of gas is or will be required by the present or future public convenience and necessity. Specifically, here, it would place upon Petitioner the burden of proving that no sale of more gas than Petitioner proposes to sell is or will be in the public convenience and necessity or that no sale of the contract quantity of gas for more than 20 years is or will be required by the present or future public convenience and necessity. The imposition of such a negative burden of proof is not only nonsense, it is erroneous as a matter of law because it is in violation of both the Natural Gas Act and the Administrative Procedure Act.

[fol. 91] E. The Commission erred as a matter of law in finding or holding that a certificate to sell a larger quantity of gas and over a longer period of time than that contracted for by applicant and proposed by applicant is less than that which applicant has contracted with its purchaser and proposed to the Commission.

The order of the Commission at mimeograph page 3, after reciting that the Commission must be able to approve "abandonment" (sic), recites:

"In addition, Section 7 (e) empowers us to authorize 'the whole or any part' of the operation, sale, service, etc., covered by the application. Where, as here, the applicant has failed to sustain its proposals in their entirety, we may properly authorize only the proposals sustainable under the facts and the law."

We must respectfully submit to the Commission that no authority should be necessary to the proposition that the

fact here is, as reiterated hereinabove, that *the certificate issued by the Commission is for a sale of more than the whole of the sale which was proposed by this Petitioner.* The only reason that this Petitioner exerts itself in this matter is that acceptance of the certificate offered would place beyond the control of the management of this Petitioner the gas reserves in the 33-square-mile area, which are in excess of the contract quantity of gas, a quantity of gas which the product of the annual contract quantity times 20 (years of the term of the contract).

We respectfully suggest that the Commission should at least modify its order by deleting the quoted phrases and base its action on some other premise. This premise is impractical and untrue.

F. The Commission erred as a matter of law in finding and holding that the evidence does not substantially support the issuance of the certificate proposed by Petitioner in its application.

We have heretofore, in Argument, stated that, if the Commission can issue a certificate for a sale of more gas for a longer period of time than that proposed by Peti- [fol. 92] tioner, it must follow that there is evidence to support a sale of a lesser quantity of gas for a lesser period of time, as was proposed by Petitioner.

The evidence in this consolidated proceeding is substantial and supports the issuance of the certificate proposed.

The Commission has issued a certificate of public convenience and necessity to the United Gas Pipe Line Company to purchase the Ridge Field gas. It is, therefore, established:

(a) That the gas sold under this contract will be transported in interstate commerce for resale;

(b) The Ridge Field gas committed under these contracts for sale to purchaser is an adequate supply of gas for the projected facilities of purchaser;

(c) That the facilities to be constructed by purchaser are feasible, economically and in an engineering sense;

(d) That purchaser has the ability to finance such facilities;

(e) That there is an end market and demand for this gas as contracted for sale;

(f) The contract quantity of gas to be sold is required by the purchaser to meet the requirements of its customers, and additional evidence established;

(g) This contract was negotiated by Petitioner with United at arm's length, there was no affiliation of any kind between Petitioner and the purchaser, and Petitioner is ready and willing lawfully to make the sale for which it had applied. (T., pp. 107-109, and Item M).

(h) In addition, there is also in evidence the application by Petitioner for a certificate of public convenience and necessity (Item M, T., p. 133). And the gas contract of Petitioner, with amendments, was introduced into evidence (Items B, C, D and E, T., pp. 19-22, 98).

We submit that the foregoing constitutes full, adequate [fol. 93] and substantial evidence that the present and future public convenience and necessity requires the whole of the sale which Petitioner has proposed and for which Petitioner prayed a certificate be issued. It may be added that such evidence is uncontroverted.

G. The Commission erred as a matter of law in finding (if any was inferentially made) and holding that the evidence substantially supports the issuance of the certificate as conditioned.

Petitioner submits that there was no finding made by either the Presiding Examiner or the Commission that the public convenience and necessity requires the certificate to be conditioned, or, that the public convenience and necessity requires the certificate to be issued without time limitation. The Examiner found (without evidence, as explained below) that the public convenience and necessity did not permit the issuance of a certificate limited in duration. (Finding (8), at Mimeo, p. 23). The Commission affirmed this holding (Order, at Mimeo, p. 2).

As indicated in subdivision F above, the evidence offered in support of the application of Petitioner was uncontroverted. Specifically, there was no evidence offered by any party, including Petitioner, that any other sale by Peti-

tioner was in the public convenience and necessity or that a sale of more gas by Petitioner was in the public convenience and necessity or that a sale of the annual contract quantity of gas for more than 20 years was in the public convenience and necessity.

Therefore, the only evidence on which the Commission can base its finding is the evidence which supports only a finding that a certificate should be granted for the contract quantity and term as proposed by Petitioner. There is *no* evidence here which supports the issuance of a conditioned certificate as issued by the order of the Commission which is the subject of this petition for rehearing.

Wherefore, Petitioner, being aggrieved by said order of the Commission dated May 9, 1958, prays that the Commission without hearing and oral argument or after hearing and oral argument modify said order by the elimination [fol. 94] of the condition "without time limitation" and cause certificate to be issued Petitioner in accordance with Petitioner's application and the evidence in this proceeding.

Respectfully submitted,

Sunray Mid-Continent Oil Company, James C. Denton, Jr., M. Darwin Kirk, Dale E. Doty, Of Counsel to Doerner, Rinehart, Stuart & Clammer, Attorney for Sunray Mid-Continent Oil Company.

May 29, 1958.

Before the Federal Power Commission

Order Denying Application For Rehearing—Issued June 21, 1958

On May 29, 1958, Sunray Mid-Continent Oil Company (Sunray), an independent producer natural-gas company, filed an application for rehearing of our order issued May 9, 1958, modifying and affirming the initial decision of the presiding examiner herein. Under the presiding examiner's decision issued February 3, 1958, certificates of public convenience and necessity would issue to Sunray and two

other producers and a pipeline company purchaser authorizing, among other things, certain sales of natural gas by the producers in the Ridge Field in southern Louisiana. For the reasons stated in our order, we affirmed the examiner including, first, his refusal to attach rate conditions to the producers' certificates; and second, his refusal to issue certificates to the producers limited in duration to 20 years, the term of the gas sales contract between the producers and the pipeline purchaser.

Sunray's objections run to the second of these holdings. In essence, the company advances four arguments. First, it argues that, since the gas sales contract is for a stated quantity of gas to be produced during a specific term of years and since the certificate would authorize the sale for an unlimited term, the Commission would thereby require Sunray to sell more gas than either the company seeks permission to sell or is obligated to sell under the contract, which is said to be beyond the Commission's powers under Section 7 (e).

[fol. 95] Second, Sunray argues that by thus requiring the company to sell more of its gas than it proposes to sell, the Commission would require the company to give up control of a part of its capital assets not even subject to the contract, and require the investment of additional capital assets, which is said to be unauthorized under law and contrary to the Commission's policy of noninterference with managerial judgment as to the terms under which the company will devote its assets to jurisdictional service.[1]

Third, Sunray argues that the Commission's requirement that the certificate be for an unlimited term instead of the 20-year term proposed by the company constitutes in effect the imposition of a condition, but that there is no finding that this condition is required by public convenience and necessity under Section 7 (e) nor is there any substantial evidence to support such a finding. In this connection the company argues that the real basis for the condition is Section 7 (b) forbidding abandonment

[1] Sunray cites Matter of Panhandle Eastern Pipe Line Co., et al., 15 F.P.C. 46 (1956) and Central West Utility Co. v. F.P.C., 247 F.2d 306.

without Commission authority but that this section is not involved in this proceeding in any way.

And fourth, Sunray argues that the Commission, in concluding to condition the certificate as above, has imposed on the company the burden of justifying the sale of additional volumes of gas for an unlimited term, even though not Sunray but some other is the proponent of such a requirement. This is said to be fallacious as well as contrary to Section 7 (c) of the Administrative Procedure Act which, it is argued, imposes on the proponent of a condition the burden thereof.

We think that, in principle, these contentions are answered in the examiner's decision and our order thereon. Although we are authorized to grant a certificate for a limited term, the record must establish that the present or future public convenience and necessity require such a provision in the certificate, just as it must support the other features of the proposed project. See Sunray Mid-Continent Oil Co. v. F.P.C., 239 F. 2d 97 (1956), reversed and remanded on other grounds, 353 U.S. 944 (1957). In considering this question it is not only proper but essential to take into account the implications of the policies embodied in the complementary provisions of Section 7 (b). The Act should be interpreted as a whole, so as to give effect to rather than defeat its interrelated provisions and purposes.

[fol. 96] Accordingly, in our view, there is no basis in fact for Sunray's first two arguments, which are premised on the assertion that the company is required to render service in excess of that called for by the contract. The extent of the service the company must ultimately render will be determined at some future time if and when it seeks permission to abandon service, a matter which we cannot and should not attempt to anticipate in this case.

However, we can and do conclude on the facts of the present record, as discussed by the presiding examiner, and in the light of the Act's provisions, that the public convenience and necessity require that the sale proposed by Sunray herein be authorized only without the 20-year limitation proposed by the company.

In view of the above, the company's further arguments that, *inter alia*, our rejection of the proposed limitation constitutes an unauthorized and unsupported "condition", and that we erred in concluding that the authorization granted Sunray constitutes only a "part" of the "service" "covered by the application" under Section 7 (e), are immaterial to the result and need not be considered further.

Nor do we think questions involving who has the burden of proof or the burden of going forward with the evidence have much practical importance at this juncture. It suffices that, as stated in our earlier order, the burden is on the applicant to support a limitation of term in a certificate, just as it is to sustain the other features of the project proposed. And we think that regardless of on whom the burden may rest, the Commission may, on its own behest and by condition or otherwise, properly issue a certificate denying a requested time limitation on the proposed service in a case where, as here, the issue was fully heard, a complete record was made thereon, and the law and the facts permit no other result.

The Commission further finds:

The assignments of error and grounds for rehearing contained in the application for rehearing filed by Sunray Mid-Continent Oil Company herein set forth no new facts or principles of law which were not fully considered by the Commission when it adopted its above-described order issued May 9, 1958, or which having now been considered warrant any change or modification of said order.

[fol. 97] The Commission orders:

The application for rehearing of the Commission's order issued May 9, 1958, filed herein by Sunray Mid-Continent Oil Company on May 29, 1958, is hereby denied.

By the Commission.

Joseph H. Gutride, Secretary.

CERTIFICATE OF TRANSCRIPT OF THE RECORD

Pursuant to the provisions of Section 19 (b) of the Natural Gas Act (15 U.S.C. § 717r (b)) and Paragraph 7 of

Rule 34 of this Court, the Federal Power Commission hereby certifies that the documents, transcripts of testimony, exhibits and other material listed and described below constitute the complete record upon which the Commission's order issued May 9, 1958, complained of in the petition in the above-entitled proceeding, was entered in a proceeding before the Commission entitled In the Matters of Sunray Mid-Continent Oil Company, et al., Docket Nos. G-12211, G-12214, G-12215 and G-12270.

[Enumeration of documents follows in original certificate.]

By the Commission.

In Witness whereof I have hereunto subscribed my name and caused the seal of the Federal Power Commission to be affixed this 26th day of September, 1958, at Washington, D.C.

J. H. Gutride, Secretary.

(Seal)

[fol. 98]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 5968—May Term, 1959

On Petition for Review of Order of the Federal Power Commission

---

SUNRAY MID-CONTINENT OIL COMPANY, Petitioner,

vs.

FEDERAL POWER COMMISSION, Respondent.

OPINION—May 27, 1959

James C. Denton, Jr., Tulsa, Oklahoma, (M. Darwin Kirk, Tulsa, Oklahoma, and Dale E. Doty, Washington, D.C. with him on the brief) for Petitioner.

Howard E. Wahrenbrock, Solicitor, Washington, D.C. (Willard W. Gatchell, General Counsel, Robert L. Russell, Assistant General Counsel, and Lloyd E. Dietrich, Attorney, Federal Power Commission, Washington, D.C. with him on the brief) for Respondent.

Before Bratton, Chief Judge, Pickett, Circuit Judge, and Knous, United States District Judge.

Pickett, Circuit Judge.

[fol. 99] Sunray Mid-Continent Oil Company, an independent producer of natural gas, entered into a contract with United Gas Pipe Line Company wherein it was agreed that Sunray would sell to United quantities of natural gas over a period of 20 years. Pursuant to Section 7(c) of the Natural Gas Act (15 U.S.C.A. §717 f (c)), Sunray applied to the Federal Power Commission for a certificate of public convenience and necessity authorizing the sale covered by the contract "to the extent, and only to the extent, that such gas is transported in interstate commerce for resale for the remainder of the term of said contract and as it may be renewed or extended, and that said certificate provide for its own expiration on the expiration of the said contract term so as to authorize Applicant to cease the delivery and sale of gas thereunder at that time."

The trial examiner denied Sunray's request that the certificate be coextensive with the term of the contract, and directed the issuance of a certificate without time limitation. The Commission affirmed the examiner with respect to the issue here.

Sunray's petition to review and modify the order alleges numerous errors, all of which are directed to the refusal of the Commission to limit the certificate to the term of the contract. Sunray contends that the Commission was without authority to issue a certificate requiring the sale [fol. 100] of larger quantities of gas over a longer period of time than required under the contract, without any evidence and a finding that public convenience and necessity so required, and that the Commission's action amounted to a rewriting of the contract.

We think the question here presented was determined by this Court in a former proceeding involving substantially

identical facts. Sunray Mid-Continent Oil Company v. Federal Power Commission, 239 F.2d 97. In the former case the Commission had held that under the provisions of Section 7(b) of the Natural Gas Act (15 U.S.C.A. §717f(b)) relating to abandonment of service, it was without authority to issue a certificate of public convenience and necessity for a limited duration. We held that while the Commission has authority under Section 7(c) and (e) to issue certificates of limited duration under proper circumstances, it is not bound by the time limitations contained in applications, and the order was affirmed because there had been no showing that such conditioning circumstances existed.[1] The Supreme Court reversed, not upon the merits of the case, but [fol. 101] for the reason that the jurisdiction of the Court of Appeals was exhausted when it held that the Commission had authority to issue certificates of limited duration, and therefore no power remained to determine whether the applicant was entitled to such a limited certificate. It was ordered that the case be remanded to the Commission for determination of that question.

In this case there was a hearing which afforded an opportunity to show that the circumstances warranted the issuance of a limited certificate, but no such showing was made. The real issue, then, is whether a natural gas company may provide for the cessation of its service on a specified future date simply by contracting to sell gas only until that date, or whether, in that situation, the service may be suspended only in a proceeding initiated under Section 7(b) of the Act.[2] We agree with the disposition of that question in the former case, where it was said:

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[1] In regard to this, the court said:

"We conclude, therefore, that in a proper case the Commission may grant certificates of convenience and necessity for periods of limited duration. In some cases, legal, physical, financial or other factors may be shown to exist which warrant conditioning certificates as to time. Petitioner here has made no such showing nor does it claim the ability to so show." (Footnote omitted)

[2] Section 7(b) reads:

"No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission,

"In order to contend otherwise the petitioner must necessarily argue that the Commission is bound by the limitations contained in applications and can grant [fol. 102] certificates only in conformity with the petitions. If this interpretation of Section 7(e) were correct the purpose of the Natural Gas Act would be defeated as the applicants could practically dictate the terms and conditions of each certificate issued by the Commission. Applicants have no such right. A natural gas company, once having entered a field of business affected with a public interest, must submit to those regulations which Congress deems necessary to protect the public. As stated by this court in Colorado Interstate Gas Co. v. Federal Power Commission, supra, the primary purpose of the Natural Gas Act is to provide comprehensive regulation of wholesale distribution to public service companies of natural gas moving interstate, and to authorize the Federal Power Commission to exercise such regulations. If the Commission is to have the power to protect the public against the exploitation of natural resources within the scope of the Act at the hands of natural gas companies, as indicated by the United States Supreme Court in Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333, it can only do so by controlling not only the initiation of transportation in interstate commerce but also con- [fol. 103] trolling the cessation of such service. No single factor in the Commission's duty to protect the public can be more important to the public than the continuity of service furnished. Congress has entrusted to the Commission the means and responsibility of achieving the statutory policy of providing for the

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or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment."

protection of the ultimate consumers of natural gas and has given it broad powers to order a natural gas company to extend its facilities, to establish physical connections, and to sell to persons engaged in distribution to the public. 15 U.S.C.A. §717f(a); Illinois Natural Gas Co. v. Central Illinois Public Service Co., 314 U.S. 498, 62 S.Ct. 384, 86 L.Ed. 371. Each of these powers is directly concerned, among other things, with providing the public adequate, reasonable, and continuous service. Each one of these powers would be a useless one if the natural gas companies could set, at the initiation of their public service, the date at which they would withdraw, abandon or cease their service."

AFFIRMED.

[fol. 104]

IN THE UNITED STATES COURT OF APPEALS

JUDGMENT—May 27, 1959

Before Honorable Sam G. Bratton, Chief Judge, and Honorable John C. Pickett, Circuit Judge, and Honorable William Lee Knous, District Judge.

This cause came on to be heard on the transcript of the record from the Federal Power Commission and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the order of the Federal Power Commission in this cause be and the same is hereby affirmed.

[fol. 105] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 106]

SUPREME COURT OF THE UNITED STATES

No. 335—October Term, 1959

SUNRAY MID-CONTINENT OIL CO., Petitioner,

vs.

FEDERAL POWER COMMISSION

ORDER ALLOWING CERTIORARI—November 9, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted. The case is transferred to the summary calendar and set for argument immediately following No. 321.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office-Supreme Court, U.S.
FILED
AUG 22 1959
JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 335

SUNRAY MID-CONTINENT OIL COMPANY, *Petitioner*

v.

FEDERAL POWER COMMISSION, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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CITATIONS

Cases:

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Sunray Mid-Continent Oil Company v. *Federal Power Commission*, Cause No. 6142 (CA 10) filed April 10, 1959 7

United Gas Pipe Line Co. v. *Mobile Gas Service Corporation, et al.*, (1956) 350 U.S. 332 6, 8, 10, 18

Statutes:

Natural Gas Act, 52 Stat. 831, 15 U.S.C. § 717(r):
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56 Stat. 83, 15 U.S.C. § 717f(b)-(e):
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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. ———

SUNRAY MID-CONTINENT OIL COMPANY, *Petitioner*

v.

FEDERAL POWER COMMISSION, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Sunray Mid-Continent Oil Company, Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled case on May 27, 1959.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A)[1] is reported at 267 F. 2d 471 (1959). The order of the Federal Power Commission (R. 79-83)[2] is reported at 19 F.P.C. 618.

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[1] References to "App. —" are to the printed appendices attached to the end of this petition.

[2] References to "R. —" are to the Transcript of Record filed in case No. 5968 below.

JURISDICTION

The judgment of the Court of Appeals was entered on May 27, 1959. No petition for rehearing was filed.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1), and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

Whether in a proceeding under Section 7(e) of the Natural Gas Act the Federal Power Commission is authorized to issue a certificate for a sale of larger quantities of gas and for a longer period of time than that proposed in the application for the certificate where there is no evidence that a sale for such longer period and larger quantity is required by public convenience and necessity.

STATUTES INVOLVED

52 Stat. 831, 15 U.S.C. § 717(r)
56 Stat. 83, 15 U.S.C. § 717f(b)-(e)
60 Stat. 241, 5 U.S.C. § 1006

STATEMENT OF THE CASE

Petitioner, on March 11, 1957, filed with the Federal Power Commission (Respondent) an Application for Certificate of Public Convenience and Necessity, under Section 7(c) and Section 7(e) of the Natural Gas Act,[3] for the sale of gas to United Gas Pipe Line Company as provided for in the gas purchase contract dated January 1, 1957. (Application at R. 18, Contract at R. 23)

The application prayed "That the Commission issue to it a Certificate of Public Convenience and Necessity authorizing the sale of gas covered by the contract . . . for the remainder of the term of said contract and as it may be renewed or extended, and that said certificate provide for its own expiration on the expiration of the said contract term so as to authorize applicant to cease the delivery and sale of gas thereunder at that time: . . ." (R. 22)

[3] 15 U.S.C. § 717f(c) and (e) (App. 28-29).

The contract provides for the sale of a quantity of the gas produced from the lands and leases of Petitioner in an area of about 33 square miles in Lafayette and Vermillion Parishes, Louisiana. (R. 24-25, 49) The contract quantity is based on proven gas reserves. It is fixed at 4.5625% per year of such reserves. (R. 26) At the present time the only known or proven gas reserves of Petitioner in this contract area are located in the "Ridge Field" in Lafayette Parish, Louisiana, which is only a small part of the contract area. (R. 15-16)

The contract recognizes that additional reserves may be discovered in the 33 square mile area and, with certain conditions precedent, provides for the inclusion under the terms of this contract of such additional gas reserves. (R. 24-25, 31-32) Both parties recognize and expect that there are additional reserves which will be discovered in the contract area later. (R. 10-11, 15-16) On the redetermination (enlargement) of the proven gas reserves for the purposes of the contract quantity, however, no retroactive effect is given to the newly discovered or added reserves. (R. 31-32)

The contract provided for the sale of 4.5625% of the gas reserves per year for only a 20-year term, with the proviso that if buyer is unable to take delivery of the quantity of gas specified as sold hereunder in the 20-year term by reason of the gas being required for cycling, repressuring or pressure maintenance operations, the term shall be extended for a period of time sufficient for buyer to be able to take delivery of additional gas so that buyer will receive the full contract quantity. (R. 44-45, 28-30)

Therefore, the contract is for a stated quantity of gas to be produced during a specific term of years. The contract recognizes that there may and probably will be reserves of gas in the described areas owned by seller which are in excess of the total contract quantity and which are not intended to be sold under this contract. Petitioner's appli-

cation is for certificate authority to sell only this quantity of gas, the prayer being framed in the terms of the length of the sale since the total contract quantity is determined by the lifespan of the contract.

Neither in the proceedings before the Commission nor in the Court of Appeals was there any question raised with respect to the foregoing interpretation of the contract, nor is there any dispute between the parties or in the court below as to facts. There is presented to this Court only questions of law.

Public hearings were held before an examiner of the Commission.[4] At these hearings, no evidence concerning the issues now for review in this case was offered by the staff of the Commission and it took no position at the hearing as to whether the proposed sale should be certificated. The examiner rendered an Initial Decision (R. 55, *et seq.*) to which Petitioner took exceptions. On May 9, 1958, the Commission issued its Order Modifying and Affirming the Initial Decision of the presiding examiner. (R. 79, *et seq.*)

The Commission when it affirmed the examiner's opinion in effect held, first, that when Petitioner applied for a certificate for, and proposed, only a sale for the contract term and quantity of gas, it asked for its own certificate to be conditioned (examiner's opinion at R. 75, Commission's opinion at R. 81), second Petitioner had failed to bear its burden of proof which was "the public convenience and necessity may not then [at end of contract] permit such abandonment . . ." (*ibid.*), and third, when the Commission granted a certificate for sale of a larger quantity of gas for a longer period of time than applied for by Petitioner, it was granting less than Petitioner's proposal as permitted by Section 7(e) of the Act. (R. 81)

[4] In addition to Petitioner, the hearing also covered the certificate applications of two other independent producers and an application of United Gas Pipe Line Company for a certificate to construct facilities with which to take delivery of the gas of Petitioner and others.

As required by Section 19(a)[5] of the Natural Gas Act, Petitioner sought Rehearing before the Respondent, and after said Rehearing was denied, timely sought review in the Circuit Court of Appeals for the Tenth Circuit pursuant to Section 19(b) of the Act.[6] That Court affirmed the position of the Commission.

The Court of Appeals held the Commission was not "bound by the time limitations contained in applications" where there was no showing that such "conditioning circumstances existed"[7] The Court posed the real issue as being whether Petitioner may provide for the cessation of its service on the specified future date simply by contracting to sell gas only until that date.[8] It felt that if Section 7(e)[9] is interpreted to provide the Commission can only grant certificates in conformity with the application for certificates, the purpose of the Natural Gas Act would be defeated because the applicant could "practically dictate" the terms of its certificate adding "Applicants have no such right. A natural gas company, once having entered a field of business affected with a public interest, must submit to these regulations which Congress deems necessary to protect the public."[10]

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals, in the instant cause:

1. Presents issues for the first time as to the scope of the statutory jurisdiction of the Federal Power Commission which are of such vital importance in the administration of the Natural Gas Act as to merit review and resolution by this Court;

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[5] App. 29.
[6] 15 U.S.C. § 717(r) App. 30.
[7] App. 24-25.
[8] App. 25.
[9] App. 29.
[10] App. 25-26.

2. Is in conflict with the principles laid down by this Court in *Atlantic Refining Co., et al.* v. *Public Service Commission of New York*, (decided June 22, 1959) ——— U.S. ———, 3 L.Ed. 2d 1312, and in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corporation, et al.* (1956) 350 U.S. 332;

3. Is in conflict in law and principle with the decision of the Circuit Court of Appeals for the Third Circuit in *Central West Utility Co.* v. *Federal Power Commission*, (1957) 247 F. 2d 306; and

4. Denies Petitioner due process of law and is in violation of Section (7) of the Administrative Procedure Act.[11]

I

The issues herein presented have never been considered by this Court, although it has enunciated basic principles closely related thereto. The clarification and resolution of these issues is imperative to the orderly administration of the Natural Gas Act and in order that applicants for certificates of public convenience and necessity may know their basic duties and legal obligations when they apply for and are granted certificates.

The Natural Gas Act requires that every seller of natural gas in interstate commerce shall first have a certificate of public convenience and necessity authorizing the sale.[12] Limiting the statistics to independent producers alone, according to a recent announcement of the Federal Power Commission,[13] 11,610 certificate applications have been filed by independent producers in the five year period from June 7, 1954, to June 30, 1959. As of June 30, 1959, 2,39[illegible] applications were before the Commission awaiting consideration at some stage in the procedural process.

The issues presented by this writ are of great concern to

[11] 60 Stat. 241 (1946), 5 U.S.C. Section 1006. App. 31.

[12] App. 28.

[13] Federal Power Commission Press Release No. 10,515, G-5522 (Pub), dated July 9, 1959.

the independent producer segment of the gas business which, as of now, does not know what its obligations under the certificate provisions of the Natural Gas Act may be, what meaning, if any, its contracts may have under certificates issued by the Commission, and, in view of the indecision now existing, has no concrete basis on which to plan the long-range development of the resources entrusted to its care by the investors in its companies.

A failure to resolve the issues presented will also result in substantial litigation in the various Circuits' Courts of Appeals. Petitioner, for example, has a cause of action involving some 90 of its certificate applications now awaiting review in the Tenth Circuit.[14] A number of independent producers have cases in process before the Commission or in the Courts raising the same issues.[15] The issues have been raised but not passed on directly in other Courts of Appeals.[16]

That the issues presented are of importance to the administration of the Natural Gas Act is shown by your decision in the *Atlantic* case [17] and its bearing upon the present interpretation by the Commission of its powers to condition permanent certificates of public convenience and necessity.

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[14] *Sunray Mid-Continent Oil Company v. Federal Power Commission*, Cause No. 6142, filed April 10, 1959.

[15] For example: On June 19, 1959, the Commission by order denied the proposal of Pan American Petroleum Corporation that certificates be limited to the contract term in 33 sales for which applications for certificate were filed (Dockets G-4063 *et al*, unreported). On August 10, 1959, the Commission denied rehearing on these dockets.

[16] See *Sun Oil Company* v. *Federal Power Commission*, (CA5, 1959) 266 F. 2d 222, especially the dissent at page 227 *et seq.*; *Hunt Oil Company* v. *Federal Power Commission* (CA5, 1959) 266 F. 2d 232; *Richardson* v. *Federal Power Commission*, (CA5, 1959) 266 F. 2d 233, petition for cert. applied for on July 14, 1959, No. 208; *Magnolia Petroleum Company* v. *Federal Power Commission*, (CA5, 1959) 266 F. 2d 234; *Humble Oil and Refining Company* v. *Federal Power Commission*, (CA5, 1959) 266 F. 2d 235.

[17] *Atlantic Refining Co., et al*, v. *Public Service Commission of New York*, (decided June 22, 1959) ——U.S.——, 3 L.Ed. 2d 1312.

II

The effect of the decision of the Court of Appeals is to sanction an order of the Commission which abrogates a private contract as to quantity and term of a sale without evidence in the record to support it. We believe that the decision of the lower court, in the instant case, is so at variance with the legal principles set forth by this Court in the *Atlantic* and *Mobile* cases as to require review by this Court and the reversal of the decision of the Court of Appeals.

In the *Mobile* case [18] in which the issue presented was the right of a natural gas company to change its rates unilaterally and the Commission's power to suspend any such proposed changes, this Court laid down the fundamental principles that: "In construing the Act, we should bear in mind that it evinces no purposes to abrogate private rate contracts as such" (350 U.S. at 338); that the Natural Gas Act permits the relations between the parties to be established initially by contract and that the protection of the public is afforded by supervision and review by the Commission of the individual contracts (350 U.S. at 339), and stressed repeatedly the necessity of preserving the integrity of contracts (350 U.S. at 344). This Court's *Atlantic* decision was based in part on its reasoning in *Mobile*. (3 L.Ed. 2d at page 1321).

In the *Atlantic* case, the Court of Appeals held the Commission had no jurisdiction of the certificate case because the proposal for certification was limited to a firm price agreed upon by the parties. (3 L.Ed. 2d at page 1318). This Court disagreed with the lower court in this respect, and held, in substance, that the filing of an application for a certificate did not constitute a dedication of the gas to the interstate market, that there was no doubt that the producers were at liberty to refuse the conditional certificates

[18] *United Gas Pipe Line Co. v. Mobile Gas Service Corporation, et al.* (1956) 350 U.S. 332.

proposed by the Commission, and that the refusal had no effect on the Commission's power to act. (3 L.Ed. 2d at pages 1318-9).

In *Atlantic* the applications were for certificates of sale of gas at the price specified in the contract. Applicants apparently initially presented of record a prima facie case, though they failed to introduce evidence whether certificates at this price would "trigger" other gas sales contract prices or that it would not lead to an increase in the rates charged by the purchaser. The opponents to this proposal showed of record that that price was higher than any price paid by the purchaser and was some 70% higher than the weighted average cost of gas to the purchaser. The opponents also showed that purchaser was obligated to construct a sixteen million dollar pipeline which was unsupported by evidence of custom or practice and that this alone would add an additional two cents per Mcf to the cost of the gas. The applicants failed to counter this evidence. (3 L.Ed. 2d at pages 1321-2).

The Commission first held that the record did not contain sufficient evidence on which to base a finding that the public convenience and necessity required the sale of gas at the proposed price. Later, after oral argument and without withdrawing its previous finding on the record, which had not been changed, the Commission issued certificates for the sale at the proposed price because, it said, the public was greatly in need of the supply of gas. (3 L.Ed. 2d at page 1318). This Court held there was insufficient evidence in the record to support a finding that the sale at the proposed price was required by the public convenience and necessity and that there was likewise no support in the record for the conclusionary finding that the public was greatly in need of this gas. (3 L.Ed. 2d at pages 1321 and 1322). Accordingly, this Court affirmed the judgment below which reversed the Commission order issuing certificates and the

applications were remanded to the Commission for further proceedings.

Before turning to the errors we believe have been committed by the court below, we wish to present briefly our views on the legal aspects of this matter and the facts with respect thereto as presented to the Commission and the lower court in order that this Court may evaluate them in light of the principles enunciated by it in the *Atlantic* and *Mobile* cases and then can compare them with the position taken by the lower court.

The Act, Section 7(e),[19] requires a seller to have a certificate of public convenience and necessity authorizing the sale issued by the Commission after a hearing held in accordance with Section 7(e). This section, which is specific and clear, provides, in part, that ". . . a certificate *shall* be issued to any qualified applicant therefore, authorizing *the whole or any part* of the . . . *sale* . . . *covered by the application* . . ." (emphasis supplied), if it is found that the applicant is able and willing lawfully to perform and that the *proposed* sale, to the extent authorized, will be required by the present or future public convenience and necessity.[20] It is thus apparent that Section 7(e) permits an applicant to make any proposal it cares to make, and that it is the Commission's duty to act upon and review the proposal made. This was the position of this Court in the *Mobile* case, *supra*, wherein the Court stated:

> . . . Recognizing the need these circumstances create for individualized arrangements between natural gas companies and distributors, the Natural Gas Act permits the relations between the parties to be established initially by contract, the protection of the public interest being afforded by supervision of the individual contracts, which to that end must be filed with the Commission and made public. (at p. 339)

As this Court recognized in the *Atlantic* case, Section

[19] App. 28.
[20] App. 29.

7(e) also contains authority for the Commission to attach to a certificate reasonable terms and conditions as the public convenience and necessity may require. This power to condition was not intended to modify, amend, or be in conflict with the provisions of the first part of Section 7(e) referred to above which directed the Commission to issue certificates for the service proposed if found to be in the public convenience and necessity, but instead was intended to supplement and assist these powers. A condition, however, to be "reasonable" as required by the Act, as well as to comply with the requirements of due process and, to be "as the public convenience and necessity may require," can only be attached to a certificate if it is based on evidence in the record in the proceeding.

The *Atlantic* case stressed this fact very clearly. It said the initial certification of the proposed service by the Commission was crucial for it was at this stage that the Commission must determine that the proposed service is in the public convenience and necessity and that the public interest would be served. It also emphasized that the finding of the Commission on the public convenience and necessity must be based upon sufficient evidence in the record. (3 L.Ed. 2d at pages 1321-2).

Under Section 7(e) of the Act, we submit that, in taking action on a certificate application, the Commission has one of four alternatives depending upon its findings of fact of the requirements of public convenience and necessity: (1) It can grant a certificate which will authorize *all* that which is proposed in the application; (2) it can grant a certificate which will authorize *part of* that which is proposed in the application; (3) it can deny the application; (4) it can grant a certificate which authorizes something different from that which was proposed in the application by attaching a condition so requiring to the certificate, so long as that condition is reasonable. A condition which requires investment of the capital assets of the applicant

in addition to that which it has determined to invest is not "reasonable." (See Part III, *infra*, for amplification of the last proposition.)

The Commission, as we have shown in the statement of the case, *supra*, takes the position this Petitioner itself proposed a condition be attached to its own certificate. This viewpoint is only intelligible if it is presumed that each and every "certificate" under the Natural Gas Act must be in perpetuity unless conditioned. The lower court seems to take the position that Petitioner is trying to dictate the terms of its certificate and sustains the Commission's decision stating there was no showing by Petitioner that "conditioning circumstances existed." The lower court also seems to take the position that Petitioner is seeking to avoid the application of Section 7(b)[21] of the Natural Gas Act to its sale.

Petitioner, of course, believes that Congress, by Section 7(e) of the Natural Gas Act, has specified that the Petitioner may apply for any proposed sale and that the Commission is required to certificate either the whole sale or that portion of it which the evidence of record shows is in the public interest, "otherwise," says Section 7(e), "such application shall be denied."[22] The Commission's position, if sustained, would require that the applicant bear a negative burden of proof, that is, that the public convenience and necessity does *not* require a sale of more gas for a longer period of time than that proposed by the applicant. The statute, of course, would only require that the applicant affirmatively support the sale he has proposed. The Administrative Procedure Act, Section 7c, is in accord and places on the opponent of the applicant the burden to support his contrary proposal.[23] (See Part IV, *infra*)

Since the certificate issued here covers a longer and

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[21] 52 Stat. 824 (1938); 15 U.S.C. Section 717f(b). (App. 28).

[22] App. 29.

[23] App. 28.

larger gas sale than Petitioner proposed, it must be that the certificate has been conditioned. Since the condition is not one requested by the Petitioner, the burden of proof required to justify or sustain the condition was not that of this Petitioner. Since there is no evidence in the record to support or justify the certificated sale of a larger quantity of gas than that proposed by the Petitioner, no matter where the burden of proof lay, the condition is void as a matter of law.

The lower court has previously held that Section 7(b) as a matter of law did not require certificates issued under Section 7(e) be without time limitation and this Court affirmed that holding.[24] Section 7(b) prevents "abandonment" of the sale without Commission authorization. Petitioner is not asking to abandon its sale, but only to complete it. A *completion* of a sale is not an *abandonment* of a sale.

III

We submit that the decision of the lower court is in conflict in law and principle with the decision of the Circuit Court of Appeals for the Third Circuit in *Central West Utility Co.* v. *Federal Power Commission*, (1957) 247 F. 2d 306, and, with the exception of the instant case, with the interpretations of the Commission as to its powers to condition a certificate so as to compel an applicant for a certificate to invest more of its capital assets than it has determined to invest.

Here, since purchaser bargained to purchase only the contract quantity of gas, Petitioner in its application for certificate proposed only the sale of such quantity of gas. But the Commission has conditioned the certificate to obligate Petitioner to sell all of its gas to the purchaser. This is a requirement that Petitioner, as a condition prece-

[24] *Sunray Mid-Continent Oil Company* v. *Federal Power Commission*, 239 F. 2d 97, 353 U.S. 944.

dent to any sale of gas, give up control of capital assets it has not offered or proposed for sale.

In the *Central West* case, *supra*, the power to condition a certificate was construed by both the Court of Appeals, Third Circuit, and the Commission to be limited so as not to permit the Commission to require an enlargement of the service proposed.

Central West Utility Company sought before the Commission to have Panhandle Eastern Pipe Line Company required to deliver to it more gas. It was shown that this would require Panhandle to construct a line for which Panhandle was unwilling to expend its money. Central West asked that the certificate issued Panhandle for construction of (other) facilities be conditioned to require this line to be constructed.

The Commission held that it could not, by the attachment of a condition, require an applicant, on the pain of not receiving a certificate as applied for, to enlarge its facilities beyond those which the management of the company has determined to devote to use in interstate commerce. *In the Matters of Panhandle Eastern Pipe Line Co., et al.*, (1956) 15 F.P.C. 46. The Third Circuit agreed completely. *Central West Utility Co.* v. *Federal Power Commission*, *supra*.

The Court quoted at some length from the Commission's opinion which held that even though the requirement of enlargement would be imposed by a condition under Section 7(e) the effect would be that it would be doing indirectly what the Court had previously forbidden it to do directly. *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission* (1953), 204 F. 2d 675 at 680.

The Commission then disposed of the contention that if it were done by a condition the action of the company in accepting the certificate subject to the condition would be "voluntary" and not "mandatory" by stating that such a distinction is completely hollow in view of the fact that the condition in question would impose heavy economic pres-

sure upon the company, and that a "choice" between acceptance with the condition on pain of denial of the certificate if the company refuses to accede to the condition cannot fairly be called "voluntary." It, however, went on to say that its position hinges upon a consideration far more basic than the foregoing and then stated:

> . . . The heart of the matter the court stated in the following language (204 F. 2d at page 680):
>
> "• • • In the light of Section 7(a) we are compelled to conclude that Congress meant to leave the question whether to employ additional capital in the enlargement of its pipeline facilities to the unfettered judgment of the stockholders and directors of each natural-gas company involved.'
>
> As the court's language establishes, there is a sphere wherein, under the Act, the judgment of the stockholders and directors of the company has free exercise, and the investment of capital for the purpose of enlarging pipeline facilities comes within that sphere. We can deny the proposed construction of facilities but except to the limited extent the Act permits, we cannot require a company to risk its capital in a venture which in the exercise of its officers' judgment, it considers unwise to undertake . . . (at p. 311)

Although the foregoing case dealt with the Commission's power to compel *enlargement of facilities* which had been proposed, the principle involved was whether the Commission had the power to require investment of capital of the applicant in addition to that which the management had determined, in the unfettered exercise of its judgment, it was willing to risk. *There is no difference in that case and the instant one*, for the management of Petitioner has determined that it is willing to invest a certain part of its capital assets for a certain period of time to its activities as a natural gas company. To require that it invest additional quantities of its gas, as would be the effect of a condition requiring Petitioner to sell beyond the period it has proposed, would require the investment of additional of its capital assets. The Commission, therefore, would have no

power to attach a condition which would require the investment of additional capital assets, even if a finding could have been made from the evidence that the public convenience and necessity required it.

The Commission has uniformly held that it could not by means of conditions compel an applicant to employ more capital than management was willing to commit and that it could not by means of conditions create a wholly new and different project than that proposed. A recent case, for example, is *In the Matters of American Louisiana Pipe Line Company, et al.* Docket Nos. G-2306, *et al.* 20 F.P.C. 575, decided October 31, 1958. This case involved multiple applicants for certificates to transport and sell gas. These applications were in part competitive. The Commission desired that one applicant, Midwestern, should serve certain customers, that it might render service from its proposed line in areas which were in need of such service, and that it also build another pipeline to bring additional Canadian gas to U.S. markets. But, Midwestern had not proposed such things and the Commission stated:

> Nor would it be proper in this case to undertake by conditions to revise any of these projects in an attempt to support their authorization. Even extensive conditions may be found reasonable in the circumstances of particular cases. See, e.g. *Houston Texas Gas & Oil Corp.*, 16 F.P.C. 118, affirmed, *Florida Economic Advisory Council* v. *F.P.C.*, 251 F. 2d 643 (CADC) *certiorari* denied, 356 U.S. 959. However, the conditions that would be required here would necessarily be so far-reaching as to redesign the projects entirely. The effect would be to preclude proof that the projects are required by the public convenience and necessity. And in this competitive case, it would deny the competitors the hearing on the new projects to which they are entitled under law. (20 F.P.C. 575 at 586)
>
> . . . We are not able, particularly in a competitive proceeding like this one, to create a wholly new and different project for Midwestern by the imposition of elaborate conditions. (20 F.P.C. 575 at 592).

Accordingly, the Commission denied the certificates requested.

The certificate issued by the Commission to this Petitioner would obligate it in perpetuity to sell all gas now or hereafter discovered in its now unexplored properties in the 33-square mile area. Such a project is obviously an entirely different project from the sale proposed by Petitioner in its application.

IV

The ruling of the Commission, in effect, extended Petitioner's contract of sale in perpetuity. This was done in the absence of any evidence adduced at the hearing or which may be inferred to support such ruling. It is an arbitrary and capricious act of the Commission which takes Petitioner's property without due process of law because it requires Petitioner to make a capital investment by sale of gas which neither Petitioner nor the purchaser intended.

In the *Atlantic* decision you stated, in substance, that where the record shows the proposed price is not in keeping with the public interest in some respect the Commission should impose a condition as it believes and the record shows to be necessary. The Commission's consistent interpretation of its powers in numerous other certificate cases is that it could only condition a certificate when there is a basis in the record for finding that the condition is required by the public convenience and necessity.

In the *Seaboard* case,[2] for example, the sole question presented to the Commission was whether a price condition should be inserted in the certificates issued to the independent producer applicants. In holding that they should not be conditioned, the Commission stated that "In the past where there has been competent evidence of record, we have held that the public convenience and necessity required the impo-

[2] *In the Matters of Seaboard Oil Company, et al.*, Docket Nos. G-11970 *et al.*, 19 F.P.C. 416, Opinion No. 309, 23 P.U.R. 3rd 1.

sition of a rate condition in an independent producer application.", citing the *Signal* case.[26] The Commission, however, found no basis in the record in the *Seaboard* case on which to base a condition, and further held that the burden of proof on the need for a condition was on the party proposing it. The Commission, among the authorities cited in support of this view, relied on the Attorney General's Manual on the Administrative Procedure Act, page 75, which contained the following quotation from the Senate Committee Report[27] on Section 7(c)[28] of that Act:

> That the proponent of a rule or order has the burden of proof means not only that the party initiating the proceeding has the general burden of coming forward with a prima facie case but that other parties who are proponents of some different result, also for that purpose have a burden to maintain. (at p. 420)

It is therefore apparent that it is the sense of Section 7(e) of the Natural Gas Act, of your decisions in the *Mobile* and *Atlantic* cases and of the Commission's own prior holdings that *whatever action the Commission may take on a certificate application, either by grant or condition, must be bottomed on substantial evidence in the record then before it.*

The facts of the instant case are of interest in this regard. In the proceeding before the Commission, the staff of the Commission had proposed a rate condition to the certificate to decrease the contract price set forth in the application and had presented certain evidence which it thought justified such a condition. The staff, however, presented no evidence that the certificate should be conditioned to change the term and quantity of gas proposed to be sold and did

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[26] Opinion No. 288, issued November 28, 1955, *In the Matters of Cities Service Gas Company, et al*, Docket Nos. G-2569, *et al.* (14 F.P.C. 134), 12 P.U.R. 3rd 3, affirmed, *Signal Oil and Gas Co.* v. *F.P.C.* 238 F. 2d 771 (CA 3), cert. denied, 353 U.S. 923.

[27] Sen. Doc. No. 248, 79th Cong., 2d Sess. 208, 270 (1946).

[28] App. 28.

not recommend that the certificate be conditioned in these respects. In fact, there was no evidence of any kind offered in the consolidated hearing before the Commission that the present or future public convenience and necessity might require a sale of more gas or a sale for a longer period than that proposed by the Petitioner in its application.

It is most interesting to note that the May 9, 1958, order of the Commission, in addition to the issue in this case, considers the issue of whether or not the certificate should be conditioned as to the contract price. The examiner's decision analyzed the Commission staff's evidence and contention that the certificates should be conditioned to reduce the price, but found the evidence insufficient and, accordingly, recommended no such condition be imposed.

The Commission agreed with the examiner and affirmed his decision stating the case comes within its opinion in the *Seaboard* case, *supra*. The opinion then states, and because of its importance, we quote:

> . . . Under the principles laid down there [*Seaboard*] and in the *Signal* case, [footnote omitted] there is no substantial evidence to establish that the producers' proposed price is excessive or that a rate condition is otherwise required by the public convenience and necessity. Nor is there substantial evidence to support a finding that staff's proposed condition is reasonable, within the meaning of Section 7(e) of the Natural Gas Act. (Bracketed portions added) (R. 80)

Therefore, in this single order the Commission held it could not impose a condition as to rate because there was no substantial evidence to support a finding that the public convenience and necessity required the conditon but it also then imposed a condition as to term and quantity of the sale in the absence of any evidence to support that condition. Therefore, there was nothing offered in support of the condition imposed which Petitioner could confront or cross-examine or rebut.

Furthermore, the imposition of the condition here also

violates Section 7(c) of the Administrative Procedure Act[29] because there was no counter-proposal made or supported in the hearing.

It is apparent that the Commission and the court below have here held that no evidentiary basis in the record is required for the Commission to issue a certificate for a larger or longer sale than that proposed by the applicant or for the Commission to condition the certificate to that extent but there *must* be an evidentiary basis in the record for the Commission to impose a rate or other condition.

Since Section 7(e)[30] is the sole conditioning authorization of the Natural Gas Act, all conditions imposed by the Commission are imposed under this single authorization. There is no basis in law or in fact for differentiation between the formality required to support and justify the different conditions.

V

This Court has remanded the *Atlantic* case, *supra*, to the Commission for further proceedings. That case, of course, and the interpretation put on it by the Commission is of tremendous importance to all segments of the natural gas industry as, we believe, is a decision in the cause herein presented. Your review and resolution of the questions presented would not only serve as a greatly needed and lasting guide post for the guidance of the Commission, the independent producers, natural gas companies and others concerned as to the issues in this case, but would also assist materially in implementing and clarifying the situation presented by the *Atlantic* case as to the means by which a condition can legally be imposed on a certificate of public convenience and necessity.

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[29] 60 Stat. 241 (1946), 5 U.S.C. Section 1006. App. 31.

[30] App. 29.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be granted.

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AUGUST 22, 1959

APPENDICES

APPENDIX A

United States Court of Appeals
Tenth Circuit

No. 5968—May Term, 1959

SUNRAY MID-CONTINENT OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT.

ON PETITION FOR REVIEW OF ORDER
OF THE FEDERAL POWER COMMISSION

May 27, 1959

James C. Denton, Jr., Tulsa, Oklahoma (M. Darwin Kirk, Tulsa, Oklahoma, and Dale E. Doty, Washington, D. C., with him on the brief) for Petitioner.

Howard E. Wahrenbrock, Solicitor, Washington, D. C. (Willard W. Gatchell, General Counsel, Robert L. Russell, Assistant General Counsel, and Lloyd E. Dietrich, Attorney, Federal Power Commission, Washington, D. C., with him on the brief) for Respondent.

Before BRATTON, *Chief Judge*, PICKETT, *Circuit Judge*, and KNOUS, *United States District Judge*.

PICKETT, *Circuit Judge*.

Sunray Mid-Continent Oil Company, an independent producer of natural gas, entered into a contract with United

Gas Pipe Line Company wherein it was agreed that Sunray would sell to United quantities of natural gas over a period of 20 years. Pursuant to Section 7(c) of the Natural Gas Act (15 U.S.C.A. § 717 f (c)), Sunray applied to the Federal Power Commission for a certificate of public convenience and necessity authorizing the sale covered by the contract "to the extent, and only to the extent, that such gas is transported in interstate commerce for resale for the remainder of the term of said contract and as it may be renewed or extended, and that said certificate provide for its own expiration on the expiration of the said contract term so as to authorize Applicant to cease the delivery and sale of gas thereunder at that time."

The trial examiner denied Sunray's request that the certificate be co-extensive with the term of the contract, and directed the issuance of a certificate without time limitation. The Commission affirmed the examiner with respect to the issue here.

Sunray's petition to review and modify the order alleges numerous errors, all of which are directed to the refusal of the Commission to limit the certificate to the term of the contract. Sunray contends that the Commission was without authority to issue a certificate requiring the sale of larger quantities of gas over a longer period of time than required under the contract, without any evidence and a finding that public convenience and necessity so required, and that the Commission's action amounted to a rewriting of the contract.

We think the question here presented was determined by this Court in a former proceeding involving substantially identical facts. *Sunray Mid-Continent Oil Company* v. *Federal Power Commission*, 239 F. 2d 97. In the former case the Commission had held that under the provisions of Section 7(b) of the Natural Gas Act (15 U.S.C.A. § 717f(b)) relating to abandonment of service, it was without authority to issue a certificate of public convenience and necessity for a limited duration. We held that while the Commission has authority under Section 7(c) and (e) to issue certificates of limited duration under proper circumstances, it is not bound by the time limitations contained in applications, and the order was affirmed because there had been no showing

that such conditioning circumstances existed.[1] The Supreme Court reversed, not upon the merits of the case, but for the reason that the jurisdiction of the Court of Appeals was exhausted when it held that the Commission had authority to issue certificates of limited duration, and therefore no power remained to determine whether the applicant was entitled to such a limited certificate. It was ordered that the case be remanded to the Commission for determination of that question.

In this case there was a hearing which afforded an opportunity to show that the circumstances warranted the issuance of a limited certificate, but no such showing was made. The real issue, then, is whether a natural gas company may provide for the cessation of its service on a specified future date simply by contracting to sell gas only until that date, or whether, in that situation, the service may be suspended only in a proceeding initiated under Section 7(b) of the Act.[2] We agree with the disposition of that question in the former case, where it was said:

> "In order to contend otherwise the petitioner must necessarily argue that the Commission is bound by the limitations contained in applications and can grant certificates only in conformity with the petitions. If this interpretation of Section 7(e) were correct the purpose of the Natural Gas Act would be defeated as the applicants could practically dictate the terms and conditions of each certificate issued by the Commission. Applicants have no such right. A natural gas company, once having entered a field of business affected with the

[1] In regard to this, the court said:

"We conclude, therefore, that in a proper case the Commission may grant certificates of convenience and necessity for periods of limited duration. In some cases, legal, physical, financial or other factors may be shown to exist which warrant conditioning certificates as to time. Petitioner here has made no such showing nor does it claim the ability to so show."

(Footnote omitted)

[2] Section 7(b) reads:

"No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment."

public interest, must submit to those regulations which Congress deems necessary to protect the public. As stated by this court in *Colorado Interstate Gas Co.* v. *Federal Power Commission, supra*, the primary purpose of the Natural Gas Act is to provide comprehensive regulation of wholesale distribution to public service companies of natural gas moving interstate, and to authorize the Federal Power Commission to exercise such regulations. If the Commission is to have the power to protect the public against the exploitation of natural resources within the scope of the Act at the hands of natural gas companies, as indicated by the United States Supreme Court in *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 64 S. Ct. 281, 88 L. Ed. 333, it can only do so by controlling not only the initiation of transportation in interstate commerce but also controlling the cessation of such service. No single factor in the Commission's duty to protect the public can be more important to the public than the continuity of service furnished. Congress has entrusted to the Commission the means and responsibility of achieving the statutory policy of providing for the protection of the ultimate consumers of natural gas and has given it broad powers to order a natural gas company to extend its facilities, to establish physical connections, and to sell to persons engaged in distribution to the public. 15 U.S.C.A. § 717f(a); *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U.S. 498, 62 S. Ct. 384, 86 L. Ed. 371. Each of these powers is directly concerned, among other things, with providing the public adequate, reasonable, and continuous service. Each one of these powers would be a useless one if the natural gas companies could set, at the initiation of their public service, the date at which they would withdraw, abandon or cease their service."

AFFIRMED.

JUDGMENT

Third Day, May Term, Wednesday, May 27th, 1959

Before HONORABLE SAM G. BRATTON, *Chief Judge*, and HONORABLE JOHN C. PICKETT, *Circuit Judge*, and HONORABLE WILLIAM LEE KNOUS, *District Judge*.

This cause came on to be heard on the transcript of the record from the Federal Power Commission and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the order of the Federal Power Commission in this cause be and the same is hereby affirmed.

[On July 2, 1959, the mandate of the United States Court of Appeals, in accordance with the opinion and judgment of said court, was issued to the Federal Power Commission.]

APPENDIX B

The pertinent provisions of the Natural Gas Act of June 21, 1938, c.556, 52 Stat. 821; as amended by Act of February 7, 1942, c.49, 56 Stat. 83; and as amended August 28, 1958, Pub.L. 85-791, § 19, 72 Stat. 947; 15 U.S.C. 717-717w, are as follows:

Section 7(b): No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. (15 U.S.C.A. § 717f(b))

Section 7(c): No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extension thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: PROVIDED, HOWEVER, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 2, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases, the Commission shall set the

matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: PROVIDED, HOWEVER, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. (15 U.S.C.A. § 717f (c))

Section 7(d): Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require. (15 U.S.C.A. § 717f(d))

Section 7(e): Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. (15 U.S.C.A. § 717f(e))

Section 19: (a) Any person, State, municipality or

State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have

been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28. (15 U.S.C.A. § 717(r))

The pertinent provision of the Administrative Procedure Act of June 11, 1946, c.324, § 60 Stat. 241; 5 U.S.C. Section 1006, subsection (c), is as follows:

Section 7(c) Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-

examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form. (5 U.S.C.A. § 1006)

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No. 335

In the Supreme Court of the United States

OCTOBER TERM, 1959

SUNRAY MID-CONTINENT OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 335

SUNRAY MID-CONTINENT OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The orders of the Federal Power Commission (R. 79–83, 94–97) are reported at 19 F.P.C. 618 and 1107. The opinion of the Court of Appeals (Pet. 23–26) is reported at 267 F. 2d 471.

JURISDICTION

The judgment of the Court of Appeals was entered on May 27, 1959 (Pet. 27). The petition for a writ of certiorari was filed on August 22, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

An independent producer of natural gas applied for a certificate of public convenience and necessity for the sale of gas for a twenty-year term. The question is whether the Federal Power Commission is required to grant a certificate limited to that term in the absence of a showing by the producer that the public convenience and necessity requires such a limitation.

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act are set forth in petitioner's appendix at pp. 28–31.

STATEMENT

Petitioner, an independent producer of natural gas, entered into a contract with United Gas Pipe Line Company whereby it agreed to sell certain gas to United for resale in interstate commerce (Pet. 23–24). The primary term of the contract is a period of twenty years (R. 44).

Pursuant to Sections 7(c) and (e) of the Natural Gas Act (Pet. 28–29), petitioner filed with the Federal Power Commission an application for a certificate of public convenience and necessity authorizing the sale (Pet. 24). The application requested (R. 22) that the sale be authorized

> * * * only * * * for the remainder of the term of said contract and as it may be renewed or extended, and that said certificate provide for its own expiration on the expiration of the said contract term so as to authorize Applicant to cease the delivery and sale of gas thereunder at that time; * * *.

After public hearings on the application (Pet. 25), the presiding examiner authorized the issuance of a certificate of public convenience and necessity to petitioner for the sale of natural gas to United (Pet. 24, R. 55–79). However, he declined to issue a certificate of limited duration, as proposed by petitioner, on the ground the petitioner had not shown that the present or future public convenience and necessity required the issuance of a certificate so conditioned (R. 75–76, 78). The Commission affirmed the determination of the presiding examiner (R. 81, 95–96).

The Court of Appeals, affirming the Commission's order, held that petitioner had not made a showing that the issuance of a certificate of limited duration was warranted and that a natural gas company could not provide for the cessation of its service on a specified future date simply by contracting to sell gas only until that date (Pet. 25).

ARGUMENT

Petitioner advances, though in a different context, essentially the same arguments as those presented by the petition in *Richardson* v. *Federal Power Commission*, No. 208, this Term. Here, petitioner, prior to accepting a certificate of public convenience and necessity authorizing the sale of natural gas to an interstate pipeline, seeks to require the Commission to limit the certificate in duration to the term of its contract with the pipeline, even though it has made no showing that such a limitation is required by the present or future public convenience and necessity. In *Richardson*, the petitioner had accepted a certifi-

cate substantially identical to that proffered by the Commission here and had filed as his original rate schedule a ten-year contract under which service had commenced in 1947. Richardson now contends that his obligation to serve the pipeline terminated in 1957 with the expiration of his contract with the pipeline; that a new certificate was required for sales thereafter; and, consequently, that a new contract filed as a rate schedule in connection with the new certificate application should have been accepted by the Commission as an initial rate not subject to suspension under Section 4(e) of the Act. Thus, in both cases, the contention of petitioners is that the obligation of an independent producer to serve a pipeline under a certificate must be limited to the duration of the contract with the pipeline unless the Commission affirmatively imposes a condition under Section 7(e) requiring a different term. For the reasons stated at pp. 5–10 of our brief in opposition in *Richardson,* to which we respectfully refer the Court, it is submitted that there is no merit to this contention and that the unlimited certificate proffered to petitioner was not an exercise of the Commission's power to impose "conditions" under Section 7(e). It is rather the proponent of the time limitation who seeks to "condition" the certificate and the burden is on him to establish the public necessity for the limitation, which petitioner admittedly failed to do here. See *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission,* 239 F. 2d 97 (C.A. 10), reversed in part and

remanded, 353 U.S. 944. There is no occasion for further review by this Court.*

*The asserted conflict (Pet. 13–17) with *Central West Utility Co.* v. *Federal Power Commission*, 247 F. 2d 306 (C.A. 3), is nonexistent. There a pipeline had applied for a certificate authorizing it to expand its transportation facilities to several areas. Both the Commission and the court held that the Commission could not condition its grant of that certificate upon the pipeline's also expanding its facilities servicing a third area, since Section 7(a) of the Act expressly provided that "the Commission shall have no authority to compel the enlargement of transportation facilities." Obviously Section 7(a) has no application here, and in any event the asserted analogy begs the question. Admittedly what was sought to be imposed in *Central West* was an independent "condition," and the very question here is whether refusing to limit the duration of the certificate is such a condition. Clearly there is a fundamental difference in public utility concepts between the right not to put additional facilities into service at all and the right asserted here to put them into service but only for a term of years.

CONCLUSION

For the reasons stated above and in our brief in opposition in *Richardson* v. *Federal Power Commission*, No. 208, this Term, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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SUNRAY MID-CONTINENT OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF OF PETITIONER

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FEDERAL POWER COMMISSION, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF OF PETITIONER

1. The Commission's brief opposing certiorari in this case does not address itself to the question here presented. Instead, the Commission chooses to characterize Petitioner's arguments as "essentially the same arguments as those presented by the petition in *Richardson* v. *Federal Power Commission*, No. 208, this Term" (Com. Br. at p. 3), and consequently it suggests that the discussion in its opposition in the *Richardson* case is fully applicable here.

While the petitioner in *Richardson* advanced arguments similar to those of the Petitioner here, the context in which they were made was so different from that of the instant case that the questions presented by the respective cases in fact bear little or no relationship. In *Richardson* the Commission had issued a certificate to a producer for the sale

of gas in interstate commerce for resale. The producer in turn had accepted the certificate and had delivered and sold gas thereunder. Subsequently, when its gas sales contract expired by its own terms, the producer entered into a new contract with the same purchaser on substantially the same terms except for price and undertook to file the new rate with the Commission as an initial rate for a new sale rather than as a rate change for an existing sale. The producer thus construed the certificate as being limited in term to the term of the expired contract.

Since the producer was in effect continuing service to the same purchaser, the Fifth Circuit regarded the matter as one primarily raising a rate question to be resolved by reference to the precedents dealing with the Commission's jurisdiction over rates. And it was only after deciding this "principal question presented" i.e. that "The rate fixed by the new contract is not an initial rate which could be changed only by order of the Commission in a proceeding under Section 5" did the Fifth Circuit turn to the "other questions [which] remain". (See 266 F. 2d at 225). Only at this point did the Fifth Circuit deal with the certificate problem presented in the case, and in that connection, it stated (266 F. 2d at 226):

> Whether, in this case, the Commission could have granted a certificate limited to the life of the contract, without abusing its discretion, need not be decided. We find nothing to show any intent of the Petitioner to apply for a limited or conditional certificate, nor do we find anything to indicate that the Commission intended to limit its certificate.

Since Petitioner in the instant case had not been selling gas under a previously issued certificate and has applied expressly for a certificate limited to the duration of its sales contract, the question presented here is not only different from those decided in *Richardson*, but, we submit, was expressly reserved by the Fifth Circuit in that case. In these circumstances, the Commission's attempt to identify the present case with *Richardson* is patently without justification.

2. To the extent that the Commission's brief in opposition in *Richardson* can be said to have any bearing on the instant case, it would appear that the Commission's position is predicated on two grounds: First, according to the Commission "the Natural Gas Act is concerned with the sale or service and its continuity, and with the rate and its reasonableness, and not primarily with any private contract pertaining to these elements". (Br. in opp. in No. 208 at p. 6). Second, the Commission argues, adopting the reasoning of the Tenth Circuit in both an earlier *Sunray* case (239 F. 2d 99, 100-101) and its opinion below (Pet. App. pp. 25-26), that if the Commission were bound by the terms of a certificate application, "the purpose of the Natural Gas Act would be defeated as the applicants could practically dictate the terms and conditions of each certificate issued by the Commission. Applicants have no such rights". (See Br. in opp. in No. 208 at p. 7). Neither of these contentions can stand analysis when examined in light of this Court's recent decisions in *Atlantic Refining Co.* v. *New York Public Service Commission*, 360 U. S. 378, and *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U. S. 332.

(a) In the *Atlantic* case, the Court of Appeals for the Third Circuit had held that by insisting upon the price set out in their applications for authorization to make new sales of gas to Tennessee Gas Transmission Company, the producers had acted so improperly as to oust the Commission of jurisdiction to pass thereon. (See 257 F. 2d 717, 723). In setting their ruling aside this Court pointed out that "No sales, intrastate or interstate, of gas had ever been made from the leases involved here" (360 U. S. at 387), and concluded that there was "nothing illegal in petitioners' rejection of the alternative price proposed by the Commission and their standing firm on their own". (See 360 U. S. at 388).

In light of a producer's freedom, thus reaffirmed in the *Atlantic* case, to decide for himself whether to commit his gas to regulation under the Natural Gas Act, a producer clearly has the right initially to insist that he will sell his

gas in interstate commerce only on the terms and conditions satisfactory to him. This does not mean that the producer is in a position to dictate the terms and conditions of the certificates issued by the Commission since under the Natural Gas Act the Commission is charged with the responsibility of determining whether a proposed sale will be in the public interest. Rather, it means that the new sales of gas will not be made unless the Commission finds the terms and conditions on which the producer is willing to make the sale are in accord with the public interest. Once it is recognized that the Natural Gas Act permits a producer to decline to commit his gas to the interstate market on terms and conditions other than those satisfactory to him, the argument that his insistence upon such terms is contrary to the purpose of the Natural Gas Act falls by its own weight.

Moreover, such recognition not only removes any obstacle to reading Section 7(e) as written by the Congress but affirmatively requires such a reading. Thus, when as here, a producer applies for authorization to sell gas in interstate commerce on a proposed basis, the Commission is bound first to consider whether the sale as proposed would be in the public interest, and only if it finds that the evidence does not support such a conclusion may it examine the evidence to ascertain whether public interest would justify issuance of the certificate on another basis. Should the Commission so find, then its proffer of such a certificate involves an exercise of the Commission's power to attach reasonable terms and conditions on the certificate, and as such, the propriety of such an offer is governed by the rules relative to the burden of proof, i.e. the burden is upon the proponent of the condition.

(b) The second ground of the Commission's position, i.e. "the Natural Gas Act is concerned with the sale or service and its continuity and with the rate and its reasonableness, and not primarily with any private contract pertaining to these elements", is predicated upon general concepts of public utility regulation which this Court held in the *Mobile*

case, were *not* enacted by the Congress in the Natural Gas Act.

In *Mobile* the Commission urged at great length that the Natural Gas Act, in common with the Interstate Commerce Act and the public utility statutes of many states, abrogated private contracts between the regulated utility and those served by it. (See Brief for the Commission in No. 31, Oct. Term 1955 at pp. 46-80). In rejecting this argument this Court ruled that

> [The Natural Gas Act] . . . evinces no purpose to abrogate private rate contracts as such. To the contrary, by requiring contracts to be filed with the Commission, the Act expressly recognizes that rates to particular customers may be set by individual contracts. In this respect, the Act is in marked contrast to the Interstate Commerce Act, ... Recognizing the need these circumstances create for individualized arrangements between natural gas companies and distributors, the Natural Gas Act permits the relations between the parties to be established initially by contract, the protection of the public interest being afforded by supervision of the individual contracts, which to that end must be filed with the Commission and made public. (350 U. S. at 338-339).

Continuing, the Court also pointed out that

> . . . The Act merely defines the review powers of the Commission and imposes such duties on natural gas companies as are necessary to effectuate those powers; it purports neither to grant nor to define the initial rate-setting powers of natural gas companies. . . . The initial rate-making and rate-changing powers of natural gas companies remain undefined and unaffected by the Act. (350 U. S. at 341, 343).

Mobile then makes it clear that the Natural Gas Act *is* primarily concerned with contracts, and that far from vesting the Commission with general powers over rates, the Act gives the Commission limited power thereover, power only to review rates filed by natural gas companies pursuant to their privately negotiated contracts but not to

initiate new rates. This limited rate jurisdiction finds its parallel in the Commission's limited jurisdiction over certificate applications (See *supra* at pp. 3-4), and together, belie the applicability of the broad public utlity concepts which the Commission and the court below seek to impart into the Natural Gas Act.

The foregoing plainly demonstrates that at the very least, the question presented by this case has not been authoritatively determined against Petitioner. Rather, the question has not yet been passed on by this Court, with the Court's past decisions favoring, we believe, Petitioner's position. In addition, the issue concerns a highly important element in a producer's business decision whether to commit his gas to interstate commerce and arises very frequently. For these reasons as well as those set out in our petition, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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October, 1959

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OPINIONS BELOW

The opinion of the Court of Appeals (R. 105-109) is reported at 267 F. 2d 471 (1959). The main order of the Federal Power Commission (R. 86-90) is reported at 19 F.P.C. 618; the Commission's order on rehearing (R. 101-104) is reported at 19 F.P.C. 1107.

JURISDICTION

The judgment of the Court of Appeals was entered on May 27, 1959 (R. 109). The petition for a writ of certiorari was filed on August 22, 1959, and granted on November 9, 1959 (R. 110). 361 U.S. 880. The jurisdiction of this Court rests upon 28 U.S.C. § 1254 (1) (1948), and Section 19(b) of the Natural Gas Act, 52 Stat. 831 (1938), 15 U.S.C. § 717r(b).

QUESTION PRESENTED

Whether Section 7(e) of the Natural Gas Act vests general authority in the Federal Power Commission to issue a certificate of public convenience and necessity to a producer of natural gas obligating him to sell for resale in interstate commerce natural gas in larger quantities and for a longer period of time than proposed in his application for the certificate and agreed to by him in the sales contract with his purchaser.

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821 (1938), as amended by 56 Stat. 83 (1942), 15 U.S.C. §§ 717-717w, are set out in the Appendix, *infra*, pp. 53-58.

STATEMENT

Sunray Mid-Continent Oil Company (Sunray) is an integrated unit operating in virtually all phases of the oil industry. It owns substantial natural gas and oil producing properties in, among others, Texas, Oklahoma, California, Kansas, Louisiana, and Arkansas. In addition to selling natural gas, Sunray owns and operates plants for the refining of crude oil into gasoline, jet fuel, fuel oil, and other products which it sells to the public and the Government. In 1958, Sunray sold and delivered about 38 million barrels of petroleum products. It also sold a total of about 140 million Mcf of natural gas produced in the various fields in which it owns gas producing properties; of this gas Sunray sold about 100 million Mcf in interstate commerce under about 160 separate contracts.

By contract dated January 1, 1957, Sunray agreed to sell to United Gas Pipe Line Company (United) gas produced from the lands and leases owned by Sunray in an area of about 33 square miles in Lafayette and Vermilion Parishes, Louisiana (R. 25-26, 53). At the present time the only known or proven gas reserves of Sunray in this

area are located in the "Ridge Field" in Lafayette Parish, Louisiana, which is only a small part of the area (R. 17). Under the contract Sunray was to deliver, and United was to take, minimum annual quantities of at least 4.5625% of these reserves, with the further right in United to take up to an additional 50% of the contract quantity or an over-all annual total of 6.84375% of the reserves (R. 26-29).

The contract recognizes that additional reserves may be discovered in the 33 square mile area and, with certain conditions precedent, provides for the inclusion under the terms of this contract of such additional gas reserves (R. 26-29, 32-34). Both parties anticipate that there are additional reserves which will be discovered in the contract area later (R. 11-12, 16-17). On the redetermination (enlargement) of the proven gas reserves for the purposes of the contract quantity, however, no retroactive effect is given to the newly discovered or added reserves (R. 32-34).

The contract provided for this sale of gas to United for only a 20-year term, with the proviso that if buyer is unable to take delivery of the quantity of gas specified as sold hereunder in the 20-year term by reason of the gas being required for cycling, repressuring or pressure maintenance operations, the term shall be extended for a period of time sufficient for buyer to be able to take delivery of additional gas so that buyer will receive the full contract quantity (R. 30).

Thereafter, on March 11, 1957, Sunray filed with the Federal Power Commission (Commission) an application for a certificate of public convenience and necessity, under Section 7(c) and Section 7(e) of the Natural Gas Act, (App. 56-58) seeking authorization from the Commission to sell gas to United in accordance with this contract (R. 20-58). In the application, Sunray specifically requested the Commission to issue to it a certificate authorizing "the sale [to United] of gas covered by the contract *** for the remainder of the term of said contract and as it may be

renewed or extended, and that said certificate provide for its own expiration on the expiration of the said contract term so as to authorize Applicant to cease the delivery and sale of gas thereunder at that time;" (R. 23-24).[1]

Public hearings were held before an Examiner of the Commission.[2] At these hearings, Sunray submitted evidence in support of the issuance of a certificate coextensive with the term of its United contract (R. 11-19). The Commission's staff, however, offered no evidence on this matter nor did it take any position as to the certification of Sunray's proposed sale to United. The Presiding Examiner rendered an Initial Decision (R. 58, *et seq.*) in which he recommended the issuance of a certificate indefinite as to duration, rather than one coextensive in term with the life of Sunray's contract. On May 9, 1958, the Commission issued its Order Modifying and Affirming the Initial Decision of the Presiding Examiner (R. 86, *et seq.*).

In affirming the Examiner's decision on this point, the Commission, citing *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 239 F. 2d 97 (C.A. 10, 1956), reversed on other grounds, 353 U.S. 944 (1957)[3] held (R. 88):

> "...while the Commission has authority to issue certificates of limited duration, it is not required to do so. If the Commission is to have the power to protect

[1] Although the application was framed in terms of the duration of the sale, it in effect sought authority to sell a specific quantity of gas inasmuch as the total contract quantity is determined by the lifespan of the contract.

[2] In addition to Sunray, the hearing also related to the certificate applications of two other independent producers and an application of United for a certificate to construct facilities with which to take delivery of the gas from Sunray and others.

[3] This Court reversed the Tenth Circuit's judgment in this *Sunray* case with the Commission's acquiescence, because the decision there improperly invaded the administrative province of the Commission. See 353 U.S. 944. In this connection, it is interesting to note that the Commission predicated the order there involved on the ground that it was wholly without authority to issue certificates of limited duration. The Tenth Circuit in this *Sunray* case held otherwise and before this Court the Commission conceded that its original ruling was erroneous. See Memorandum for the Federal Power Commission in *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, No. 814, October Term, 1956, at pp. 4-5.

> the public, *** it must be able to prevent abandonment, and the burden to support a limitation of term in a certificate is upon the applicant. In addition, Section 7(e) empowers us to authorize 'the whole or any part' of the operation, sale, service, etc., covered by the application. Where, as here, the applicant has failed to sustain its proposals in their entirety, we may properly authorize only the proposals sustainable under the facts and the law.

Following the Commission's denial of Sunray's application for rehearing (R. 90-101, 101-104), Sunray filed a petition for review with the Court of Appeals for the Tenth Circuit (R. 1-10).

The court below affirmed the Commission's order (R. 105-109). Quoting at length from its decision in the earlier *Sunray* case, the Tenth Circuit held that if Sunray's position was correct,

> ***the purpose of the Natural Gas Act would be defeated as the applicants could practically dictate the terms and conditions of each certificate issued by the Commission. Applicants have no such right. A natural gas company, once having entered a field of business affected with a public interest, must submit to those regulations which Congress deems necessary to protect the public. *** (R. 108).

In the same vein, the Court of Appeals continued (R. 108-109):

> ***No single factor in the Commission's duty to protect the public can be more important to the public than the continuity of service furnished. Congress has entrusted to the Commission the means and responsibility of achieving the statutory policy of providing for the protection of the ultimate consumers of natural gas and has given it broad powers to order a natural gas company to extend its facilities, to establish physical connections, and to sell to persons engaged in distribution to the public. *** Each one of these powers would be a useless one if the natural gas companies could set, at the initiation of their public service, the date at which they would withdraw, abandon or cease their service.

SUMMARY OF ARGUMENT

The Court of Appeals erred in affirming the Commission's issuance to Sunray for this new sale of gas of a certificate of public convenience and necessity, unlimited in duration, instead of a certificate, coextensive with the term of Sunray's contract, as specifically requested in its application.

A. 1. The Natural Gas Act does not authorize the Commission to issue certificates for a period longer than that applied for. Section 7(e) of the Act limits the Commission's certificate power to the term of the application by providing only for the issuance of certificates authorizing "the whole or any part of the ***, sales, ***, covered by the application," and by requiring, as a prerequisite to the issuance of a certificate, a Commission finding that "the applicant is able and willing properly to do the acts *** proposed." With the applicant's willingness to sell gas restricted to the period covered by his application and contract, the Commission cannot validly find that he is willing to sell gas for a longer period of time. So read, Section 7(e) harmonizes with Section 7(b); the latter, if applicable at all to producers' sales, would require Commission approval of abandonment only within the period provided in the certificate as issued.

2. A certificate, unlimited in duration, does not, contrary to the Commission, constitute authorization of only part of Sunray's proposal. The necessary effect of such a certificate is to require delivery of the specified quantities for a period of time longer than proposed by it, and hence to deliver total volume of gas in excess of that covered by its application and contract.

3. Nor is an applicant barred from specifying the terms on which he will make new sales of gas. The Natural Gas Act does not vest the Commission with power to compel the owner of gas to dedicate new gas to the interstate market. An inherent part of an applicant's freedom of choice as to how he will sell his gas is the right, reaffirmed in *Atlantic*

Refining Co. v. *Public Service Commission of the State of New York*, 360 U.S. 378, 387-388 (1959), to stand firm upon his terms for selling this gas in interstate commerce. Since the Commission, however, may not issue a certificate unless the seller's proposal is in the public interest, this right in the seller is in no way inconsistent with the Natural Gas Act or violative of its purposes.

B. 1. Requiring the seller to deliver more gas than proposed in his application and contract is not justified by an alleged responsibility in the Commission to assure continuity of service. In the first place, the Natural Gas Act, and in particular Section 7(a) relied on by the court below, does not vest the Commission with broad powers to assure continuity of service. To the contrary, read together with the proviso in that Section, the Commission's authority under Section 7(a) is in fact extremely limited and does not extend to invading the prerogatives of management with regard to the investment of additional assets. *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 204 F. 2d 675 (C.A. 3, 1953).

2. Moreover, Section 1(b)'s exemption for "the production or gathering of natural gas" may not be infringed to achieve continuity of service. The Court has already held that this exemption precluded Commission regulation over the transfer of gas leases, even though the pipeline company could thereby "render itself unable to continue service; consequently, abandonment of facilities and service without the consent of the Commission will result" *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 509 (1949). Since a certificate of unlimited duration necessarily requires a producer to produce more gas than covered by his application and gas production is clearly within the exemption, such a certificate improperly invades the "production or gathering" exemption.

3. In addition, in light of the Commission's standards as to adequacy of service, there is no need for producer certi-

ficates to be unlimited in duration. In authorizing new pipeline service, the Commission, although it cannot compel a pipeline to obtain additional gas supplies, has never insisted that the pipeline have a gas supply for more than 20 years' service. Indeed, in recent cases, it has been satisfied with gas supplies with a deliverability period of as low as 11.5 years. Consistently therewith, the Commission here can hardly insist that continuity of service requires Sunray's sales to be of indefinite duration, rather than for the 20 years provided in its application and contract, particularly since unlike a distributing company, a pipeline company typically purchases gas from many producers and is not dependent upon a single producer for even a major portion of its gas supply.

C. 1. Both the Commission and the court below improperly assumed that the Natural Gas Act, in common with other regulatory statutes, embodies broad regulatory concepts, including a presumption that certificates are to be indefinite in duration. But, as this Court has already held in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), because of the special problems and needs of the natural gas industry, the Act preserves the integrity of contracts. While *Mobile* related to the Commission's rate authority, its thrust is to define generally the interrelationship between the Natural Gas Act and private contracts.

Even as a question of first impression, the result is the same. Not only may a statute not be construed as nullifying private contracts unless it contains clear authorization, but the Act's legislative history and purpose strongly indicate a contrary intention. Congress was fully apprised that long-term contracts were basic to the healthy functioning of the natural gas industry; yet nowhere in the hearings, Committee reports or debates on the floor of Congress is there even a suggestion of an intention to destroy these contracts. Moreover, such destruction of contracts was unnecessary to

achieve the Act's primary purpose of closing the so-called *Attleboro* gap and in this way to protect the ultimate consumers. Being also concerned with the legitimate interests of the natural gas companies as well as the needs of the consumers, Congress balanced their respective interests by limiting Commission regulation to supervision and review of wholesale interstate contracts. The Commission's consistent practice, in addition, as manifested in its Order No. 144, under which the Commission adopted the so-called tariff-and-service-agreement method of defining the relationship of a pipeline to its purchasers and which is honeycombed with provisions relating to contracts, their preservation and term, dissipates any remaining doubt on this score.

2. The Natural Gas Act's preservation of private contracts distinguishes it from other regulatory statutes and destroys any presumption that generally certificates are to be indefinite in duration. Apart from the absence of such presumption not being inconsistent with regulation in the public interest, the Commission's functions under the Act do not extend to the initiation of new or additional service or sales as would be involved under a certificate of unlimited duration where the seller would be required to deliver more gas than embraced by his contract.

Moreover, since neither the Act nor its legislative history anywhere indicates a Congressional intent to provide anything other than an even-handed preservation of contracts, there is no basis for such a presumption in light of *Mobile, supra*. And with Congress fully apprised of the wide-spread prevalence of contractual agreements in the natural gas industry and its needs therefor, it could hardly have intended the Commission to have the general authority to require sales of gas without contractual foundation by requiring their continuance beyond the term of the parties' contract. Finally, since the term of a gas contract is usually as important to the parties as its provisions as to rates,

the general presumption assumed by the Commission would be in square conflict with continued integrity of private contracts. Consequently, as with regard to rates, the Commission is required under Section 7(e) generally to respect the parties' contract in accordance with which the applicant seeks a certificate; its only general authority is to supervise and review these contracts.

D. Certificates coextensive with the term of their sales contracts are essential to legitimate interests of the producers because of the unique characteristics of the gas production business. Unlike other regulated industries, natural gas production is an extractive industry, dependent upon extensive exploration and discovery for its future sources of supply. Consequently, not only is the gas production business extremely risky and highly speculative, but a producer's production activities are fixed by the location of his gas reserves and his sales contracts usually are of gas only from specified reserves, and not of gas being generally produced by him. With the desirability of producing gas varying from field to field, depending upon a number of economic and geological factors, a producer needs periodically to reappraise his production from a particular reserve and determine whether, from an over-all point of view, that reserve should be continued in production. Since his sales are inextricably tied to his production, a *sine qua non* of such reappraisal is the freedom in the producer to discontinue the sale of natural gas from that reserve at the termination of the contract therefor.

Moreover, most natural gas producers are also substantial producers of oil—which is not subject to Federal regulation—both because of the impossibility of exploring and discovering one to the exclusion of the other and because oil and natural gas are frequently produced through geological necessity as joint products. Since economically oil and natural gas are also competing fuels, the tremendous expansion in the use of natural gas during the past decade has

markedly curtailed the market for the competing heating oils. Inasmuch as the average well-head price of gas is only one-fifth of that of crude oil, the revenues of the oil-natural gas producers have been adversely affected and the resulting surplus of oil and the weakening of oil prices has cast doubt upon the ability of oil-natural gas production business generally to undertake the expansion needed in the public interest in the near future.

While the impact of these increased natural gas sales upon the oil business varies from company to company, the competition between these two segments of a producer's business makes it imperative for him periodically to review his gas production with reference to its effect upon his combined oil-natural gas business and the investors therein. Accordingly, enabling a producer, at the termination of a gas sales contract, to make a fresh valuation of the production of that gas not only accords proper balance to the investor interest in the oil-natural gas production business but is essential to its economic well-being.

ARGUMENT

Sunray Was Entitled To A Certificate In Accordance With Its Application And Contract

In this case, Sunray contracted to sell annually to United Gas Pipe Line Company a precisely defined quantity of gas from acreage never before committed to the interstate market for a basic term of 20 years. Prior to delivering any gas under this contract, Sunray filed with the Commission an application for a certificate of public convenience and necessity under Section 7(c) (App. 57, 58) of the Natural Gas Act for authority to deliver the gas to United in accordance with the contract; in its application, Sunray specifically requested that the life of the authorization be coextensive with that of the sales contract. Under such a certificate if granted, Sunray could discontinue delivering gas to United at the termination of the contract without

further proceedings before the Commission. Instead of issuing a certificate as requested by Sunray, the Commission issued a certificate which would obligate Sunray to deliver gas to United indefinitely and without reference to the termination date set out in the contract or its other provisions and contrary to the terms of the application. Under this certificate Sunray would be required to deliver gas even though the contract had expired until the Commission would permit its discontinuance pursuant to Section 7(b) (App. 56) of the Act. The approval by the court below of the action of the Commission which undertook to issue a certificate of unlimited duration, we submit, was plain error.

A. Section 7(e) of the Gas Act Does Not Authorize the Issuance of a Certificate Requiring Sales for a Period Longer Than Requested in the Application and Provided for in the Contract

1. *Section 7(e) clearly authorizes the issuance of a certificate as requested in the application and contract.* The Commission's authority with regard to the issuance of certificates of public convenience and necessity for new sales of gas in interstate commerce is defined in Section 7(e) of the Act. That Section in so many words precludes the Commission from issuing a certificate for a period longer than that applied for. It provides in pertinent part:

> "*** a certificate shall be issued to any qualified applicant therefor, *authorizing the whole or any part of the* ***, *sale*, *** *covered by the application, if it is found that the applicant is able and willing properly to do the acts* and to perform the service proposed, *** and that the proposed ***, sale, ***, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. ***"[*]

Under the express terms of Section 7(e), it should be noted, the Commission's power to issue certificates of public

[*] Italics are supplied throughout the brief unless otherwise noted.

convenience and necessity extends only to "authorizing the whole or any part of the ***, sale, ***, covered by the application,". Where, as here, the contract between the parties is for a stated quantity of gas to be produced and delivered from specified acreage and the application for a certificate expressly requests authority to deliver that volume of gas, Section 7(e) in plain language, empowers the Commission only to authorize the delivery of that quantity of gas, "or any part of". Thus, the Commission's authority to issue certificates for new sales of gas is limited by the terms of the application and there is nothing in Section 7(e) empowering the Commission to issue a certificate requiring the delivery of greater quantities of gas than covered by the application.

That Section 7(e) is so limited is also manifest from its further provision that the certificate is to be issued "if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed". By filing an application requesting a certificate to sell a specified quantity of gas for a stated period coextensive with the life of its sales contract, the applicant makes it clear that his willingness to sell this gas in interstate commerce is restricted to that aggregate volume of gas. In these circumstances, the Commission has no basis for finding that the applicant is "willing" to sell more gas than that covered by his application. Since such a finding is a prerequisite to granting the certificate issued, the fact that the applicant is "willing" to sell only a fixed amount of gas in interstate commerce precludes the Commission from making the finding necessary to justify the issuance of a certificate for a greater volume of gas. As a result of this limited willingness on the part of the applicant, the maximum sales for which the Commission may issue a certificate under Section 7(e) is restricted to the quantities of gas as set out in the certificate application.

This reading of Section 7(e) in no way results in a con-

flict with Section 7(b). The abandonment provisions of Section 7(b) apply only to facilities subject to the Commission's jurisdiction and service rendered thereby, whereas Section 7(e) extends not only to "service" but "sales" as well. And a producer's application under Section 7(e) typically extends only to the sales of gas. Even if assuming *arguendo* that Section 7(b) would apply to the discontinuance of the sales of gas by a producer, that Section is still completely harmonious with Section 7(e). A certificate issued under Section 7(e) defines the period during which the sale is to be made or the service rendered. Section 7(b) deals with the abandonment of service short of the period defined in the certificate issued. Consequently, there could be no discontinuance of service short of the term set out in a certificate of limited duration without Commission approval under Section 7(b).

2. *Issuing a certificate of indefinite duration requires the delivery of more gas than the amount covered by the application and contract.* The Commission's opinion suggests that where the application is for a certificate for a specific term of years, a certificate of unlimited duration may, nevertheless, be issued properly under Section 7(e) because, according to the Commission, such a certificate is less than that requested and hence constitutes authorization of only part of the applicant's proposal (R. 88):

> ***Where, as here, the applicant has failed to sustain its proposals in their entirety, we may properly authorize only the proposals sustainable under the facts and the law.

This reasoning is patently unsound. There can be no doubt that the necessary effect of requiring an applicant to deliver a specified quantity of gas for a longer period of time than proposed is to require him to deliver, in the aggregate, greater quantities of gas. Because of this fact, the present situation is indistinguishable from that in which an applicant seeks authority to deliver, say 10,000 Mcf

of gas a day, to a purchaser, and the Commission undertakes to issue a certificate for the delivery of 15,000 Mcf a day for the same period of time. In the latter case, it would be plain that the total volume of gas to be delivered exceeded the amount covered by the application and contract and the Commission would be without authority to issue such a certificate. By the same token, when an applicant seeks authority to sell a specified quantity of gas for a fixed period of time, the issuance of a certificate for a longer term requires the delivery of a total volume of gas in excess of that covered by the application and contract. Since in both situations the certificate issued by the Commission exceeds the bounds of the application and contract, such certificates are beyond the Commission's authority under Section 7(e).

With a certificate of indefinite duration such as that issued here to Sunray thus imposing a more onerous obligation upon Sunray than that sought in its application, the Commission's finding here that Sunray "has failed to sustain its proposals in their entirety" (R. 88) is plainly without substance. The only evidence introduced on this question came from Sunray and that evidence justified only the issuance of a certificate of limited duration (R. 15-19).

3. *An applicant may specify the terms on which he will make a new sale of gas.* The court below declined to read Section 7(e) in accordance with its plain language because, in its view (R. 108):

> "***If this interpretation of Section 7(e) were correct the purpose of the Natural Gas Act would be defeated as the applicants could practically dictate the terms and conditions of each certificate issued by the Commission. Applicants have no such right. ***

In so holding, the Court of Appeals overlooked the significant fact that under the Natural Gas Act there is no way by which the Commission can compel the dedication of new gas to interstate commerce. A person owning such gas

retains complete freedom of choice whether to sell it in the interstate market or not. If he decides not to sell it in interstate commerce and to use it otherwise, he in no way violates the Natural Gas Act. It is true that once a person sells gas for resale in interstate commerce, he becomes subject to regulation under the Act, but until he actually makes such interstate sales, he is completely within his rights not to sell his gas in the interstate market. An inherent part of this freedom of choice is that the owner of the gas may initially specify the terms on which he will dedicate his gas to interstate commerce; if these terms are not met, the owner is free to decline to make the sale.

This right was recently reaffirmed by this Court in *Atlantic Refining Co.* v. *Public Service Commission of the State of New York*, 360 U.S. 378 (1959). In that case the Court of Appeals for the Third Circuit had held that by insisting upon the prices set out in their applications for certificates to make new interstate sales of gas and by "threatening" not to make the sales other than at the initial prices proposed by them, the producers had so limited the scope of the Commission's inquiry as to oust it of jurisdiction (257 F. 2d 717, 723). Pointing out that "No sales, intrastate or interstate, of gas had ever been made from the leases involved here" (360 U.S. at 387), this Court rejected the Third Circuit's ruling (*id.* at 387-388):

> "... Certainly the filing of the application for a certificate did not constitute a dedication to the interstate market of the gas recoverable under these leases. Nor is there doubt that the producers were at liberty to refuse conditional certificates proposed by the Commission's second order. ... We find nothing illegal in the petitioners' rejection of the alternative price proposed by the Commission and their standing firm on their own.

The fact that the applicant is entitled to stand firm on the terms of his proposed interstate sale of gas does not mean that he thereby is in a position to "dictate the terms

and conditions of each certificate issued by the Commission" (R. 108). Under the Natural Gas Act, the Commission has the responsibility for determining whether a proposed sale will be in the public interest and consequently the Commission need not, indeed cannot, authorize a sale of gas unless it finds that the sale, including the terms and conditions on which the producer is willing to make it, is in the public interest. Only if the Commission finds that the terms proposed by the applicant coincide with the public interest need it issue the certificate.[5] If it finds that the public interest will not be served by sanctioning the sale on the terms specified by the application, the Commission is required by Section 7(e) to deny the application. Thus, once it is recognized that under the Natural Gas Act a seller of gas retains his freedom whether or not to commit his gas to the interstate market and that the Commission is not required to issue a certificate unless the seller's proposal to sell his gas is in the public interest, it becomes clear that the right of the seller to specify the terms and conditions under which he will sell his gas in interstate commerce is in no way inconsistent with the Natural Gas Act or violative of its purposes.

B. Continuity of Service Does Not Justify Requiring the Seller to Deliver More Gas Than Proposed in His Application

In support of the conclusion below, both the Court of Appeals and the Commission urge that the issuance of certificates of unlimited duration are necessary in order to provide continuity of service to the ultimate consumers.[6]

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[5] We show *infra* pp. 26-28 that a contract for a basic term of 20 years, such as that here involved, more than meets the Commission's standards for complying with the public interest, at least as far as duration of the sale is concerned.

[6] By casting our discussion in terms used by the Commission and the court, we do not mean to indicate agreement that a producer's sales of gas involve the providing of a service. To the contrary, as stated in *Gulf Oil Corporation* v. *Federal Power Commission*, 255 F. 2d 556, 557 (C.A. 5, 1958), "producers are in reality selling gas which they own and are not, in the traditional sense, primarily furnishing a service to the public."

According to the court below, "No single factor in the Commission's duty to protect the public can be more important to the public than the continuity of service furnished" (R. 108). In the same vein, the Commission claims (Br. in Opp. to Petition for Writ of Certiorari, *S. W. Richardson v. Federal Power Commission*, No. 208, October Term, 1959, at p. 6)[7]:

> *** the Natural Gas Act is concerned with the sale or service and its continuity, and with the rate and its reasonableness, and not primarily with any private contract pertaining to these elements. *** [8]

There is, however, nothing in the Gas Act expressly imposing a duty upon the Commission to assure continuity of service. And even if there were, that duty would be circumscribed by the other provisions of the Act, in particular the proviso in Section 1(b) (App. 56) exempting from Commission jurisdiction "the production or gathering of natural gas". In any case, continuity of service does not, under the Commission's established practice, require the issuance of certificates of unlimited duration.

1. *The Natural Gas Act does not vest the Commission with broad powers to assure continuity of service.* It should be noted, at the outset, that there is nothing in the four corners of the Natural Gas Act imposing responsibility upon the Commission to assure continuity of service. The only provision cited by the court below in support of its broad statement is Section 7(a) (App. 53),[9] which,

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[7] The Commission's brief in opposition in No. 208 is incorporated by reference in its brief in opposition in the instant case.

[8] We discuss *infra* pp. 28-43 the interrelationship between private contracts and the Natural Gas Act.

[9] The court below also relies on *Illinois Natural Gas Co. v. Central Illinois Public Service Co.*, 314 U.S. 498 (1942). That case, however, holds only that in light of the Natural Gas Act, a state commission could not order an interstate company to supply gas to a local distributing company. There was no question there as to the scope of the Federal Power Commission's authority under Section 7(a).

according to the court, gives the Commission "broad powers to order a natural gas company to extend its facilities, to establish physical connections, and to sell to persons engaged in distribution to the public." (R. 409).[10]

Section 7(a), however, falls far short of vesting such sweeping powers in the Commission. Under the terms of Section 7(a), the Commission may not issue such an order to a natural gas company if it will result in an undue burden upon the company. Moreover, Section 7(a) goes on further specifically to limit the authority:

> ***: Provided, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

This further provision of Section 7(a) substantially limits the authority vested in the Commission by the earlier language of that Section and hence precludes the breadth attributed to that Section by the court below.

That the Commission's authority under Section 7(a) is in fact extremely narrow is exemplified by *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 204 F. 2d 675 (C.A. 3, 1953) and *Central West Utility Co.* v. *Federal Power Commission*, 247 F. 2d 306 (C.A. 3, 1957). In the *Panhandle* case, the Commission had found in a proceeding under Section 5(a) of the Act that Panhandle's refusal to deliver more gas to certain customers, including Central West Utility Company, through the so-called "Liberty Lateral" would result in undue discrimination in violation of Section 4(b) of the Act (App. 53). To eliminate this discrimination, the Commission had ordered Panhandle to deliver the additional gas to these customers through that

[10] In passing, it should be noted that Section 7(a) in terms applies only with regard to pipeline companies *vis a vis* distributors which purchase from them and not to sales of gas by producers to pipelines.

lateral. Under the Commission's order, the total gas now to be delivered through the Liberty Lateral exceeded its design capacity, and compliance with the order would have required Panhandle to enlarge the lateral. Despite the fact that the purpose of the Commission's order was to eliminate illegal discrimination, the Third Circuit held that Section 7(a) withheld from the Commission the authority to compel Panhandle so to enlarge the line (204 F. 2d at 680):

> *** Such an order is, ***, the equivalent of an order for the improvement of transportation facilities by their enlargement and as such is expressly within the ban of the proviso of section 7(a). Moreover, even in the absence of the proviso of section 7(a) there might well be a question whether the language of section 5(a) conferred unlimited power upon the Commission to compel a natural gas company to employ additional capital in the enlargement of its transportation facilities. Compare *I.C.C.* v. *U.S. ex rel. City of Los Angeles*, 1929, 280 U.S. 52, 50 S.Ct. 53, 74 L. Ed. 163. In the light of Section 7(a) we are compelled to conclude that Congress meant to leave the question whether to employ additional capital in the enlargement of its pipeline facilities to the unfettered judgment of the stockholders and directors of each natural gas company involved.

In the *Central West* case, Central West had requested the Commission to eliminate the illegal discrimination by conditioning the grant of a certificate of public convenience and necessity issued to Panhandle upon Panhandle's enlarging the Liberty Lateral (247 F. 2d at 308). Central West argued that by so conditioning the certificate, the Commission left Panhandle with a "voluntary" choice whether or not to accept the certificate and hence if it accepted the certificate as so conditioned, its enlargement of the Liberty Lateral in accordance therewith would not violate Section 7(a) (247 F. 2d at 311). The Commission, however, with the approval of the Third Circuit, ruled that that court's holding in the earlier case foreclosed the imposition of such a condition (*ibid*):

> As the court's language [in the *Panhandle* case *supra*

> p. 20] establishes, there is a sphere wherein, under the Act, the judgment of the stockholders and directors of the company has free exercise, and the investment of capital for the purpose of enlarging pipeline facilities comes within that sphere. We can deny the proposed construction of facilities but *except to the limited extent the Act permits*, we cannot require a company to risk its capital in a venture which in the exercise of its officers' judgment, it considers unwise to undertake. *** And by specifying the volumes of gas which shall be delivered by the Liberty Lateral, we would not only require the investment of capital associated therewith but would define the extent of investment. Obviously, this would take decision on these matters, respecting which it is management's right and obligation to judge, out of management's hands. (247 F. 2d at 317)

In addition to thus making clear that Section 7(a) does not in fact vest the Commission with broad powers to assure continuity of service, these cases further reveal a limitation upon the Commission's authority which is highly pertinent here. By applying for a certificate coextensive with its sales contract, Sunray has manifested a willingness to devote a certain part of its capital assets for the period covered by the contract to its activities as a natural gas company. To require that it dedicate additional quantities of gas to this sale, as would be the effect of a certificate of unlimited duration, would compel the additional investment by Sunray of its capital assets. Since such a requirement would take away from Sunray the management decision which the Act intended to leave with it, it is beyond the Commission's authority to impose, even if Section 7(a) were applicable to producers' sales, under the *Panhandle* and *Central West* cases.

2. *The production and gathering exemption may not be invaded in order to provide continuity of service.* Even if the Act could be said to vest the Commission with the responsibility of assuring continuity of service, it would be subject to the proviso of Section 1(b) (App. 53) of the Act specifically exempting from the Commission's jurisdiction,

"the production or gathering of natural gas". In the *Panhandle* case, *supra*, the Third Circuit alluded to this exemption by pointing out (204 F. 2d at 680):

> ••• if the Commission could require a natural gas company to enlarge its transportation facilities for the purpose of delivering more gas through them, the Commission would be effectively regulating the production and gathering of natural gas. Obviously such enlarged transportation facilities could not deliver additional gas unless it was produced and gathered.

This comment has particular significance when, as here, the Commission undertakes to require a producer to deliver gas for a period longer than covered by his application and contract. As we have shown, *supra*, pp. 14-15, such a requirement necessarily operates to compel the producer to deliver more gas than he is willing to dedicate to the interstate market. Consequently, the net result of the requirement would be to force the producer physically to produce more gas, and since the physical activities of producing gas clearly constitute part of production and come within the exemption as previously construed by this Court (see *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 678 (1954) and cases there cited),[11] it follows that the requirement would improperly invade the area of production and gathering of natural gas, which the Act specifically excludes from the Commission's jurisdiction.

On this point, another Panhandle case, *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949), is highly relevant and merits detailed discussion. In this *Panhandle* case the Commission had sought to enjoin as violative of the Gas Act the transfer by a pipe-

[11] Although as an exception to the primary grant of jurisdiction, the production and gathering exemption has been strictly construed (*Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U.S. 682, 690-691 (1947)), this Court has long recognized that the exemption covers at least the physical activities, facilities and properties used in the production and gathering of natural gas. See *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 U.S. 581, 602-603 (1945).

line company to a third party of gas leases which it owned and from which it had produced and sold gas in interstate commerce. The Commission there pointed out that Panhandle had included these leases as part of its gas reserves in connection with three certificate applications (337 U.S. at 507). Based on these assertions the Commission argued that these leases had "been dedicated to the discharge of Panhandle's public-utility obligation to render adequate service at reasonable and nondiscriminatory rates" (*id.* at 507). Accordingly, the Commission claimed that the leases could not "be relinquished by Panhandle without the consent of the Commission, which has the implied power to protect its rate-making function and to insure the maintenance of adequate service by a natural-gas company" (*id.* at 508).

In the same vein, the Commission, relying heavily upon Section 7(b) of the Act relating to abandonment of service, further contended that "since natural gas is the 'lifeblood' of a pipe-line system, a company by disposing of its gas reserves, unhampered by Commission control, may render itself unable to continue service; consequently abandonment of facilities and service without the consent of the Commission will result" (*id.* at 509).

The Court rejected in their entirety these arguments, which, it may be noted, are indistinguishable, for all practical purposes, from the reasoning of both the court below and the Commission in the instant case. The Court did not question the factual validity of the Commission's position and the consequences predicted by the Commission of a contrary holding. Despite this, however, the Court ruled that the Commission was without power under the Natural Gas Act to prevent the transfer of these leases. The Court held that the leases constituted an essential part of production and hence they were exempt from Commission control by virtue of the proviso in Section 1(b) of the Act (337 U.S. at 509-512):

> To accept these arguments springing from power to allow interstate service, fix rates, and control abandonment would establish wide control by the Federal Power Commission over the production and gathering of gas. It would invite expansion of power into other phases of the forbidden area.[14] It would be an assumption of powers specifically denied the Commission by the words of the Act as explained in the report and on the floor of both Houses of Congress. [footnote omitted] The legislative history of this Act is replete with evidence of the care taken by Congress to keep the power over the production and gathering of gas within the states. [footnote omitted] ***.
>
> [14] Would it soon be contended that statutory power to require extension of service, § 7(a), included power to require exploration or acquisition of leases or allocation of production to interstate pipe lines in order to serve the public interest?

Further commenting that the effect of the Commission's argument would be improperly to extend its power to "the constitutional limit of congressional authority over commerce." (*id.* at 508), the Court concluded (*id.* at 513, 514):

> *** Congress enacted this Act after full consideration of the problems of production and distribution. It considered the state interests as well as the national interest. It had both producers and consumers in mind. Legislative adjustments were made to reconcile the conflicting views.
>
> • • • •
>
> *** We cannot attribute to Congress the intent to grant such far-reaching powers as implicit in the Act when that body has endeavored to be precise and explicit in defining the limits to the exercise of federal power. [footnote omitted] [12]

The *Panhandle* case [12] is, we believe, important here not only because in addition to demonstrating the fundamental

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[12] It is significant that the Court pointed out in *Panhandle* that Section 7(b) applies to the abandonment of "facilities subject to the jurisdiction of the Commission," and commented that the Commission argument begged the question (337 U.S. at 508-509). Sunray's application here merely sought authority to sell gas to United; it did not ask for permission to construct or operate in connection therewith any facilities subject to the Commission's jurisdiction (see R. 20-24).

weaknesses of the reading of the Act espoused both by the Commission and the court below, it graphically brings into focus the dangers which inhere in the Commission's proposed expansion of the Act. These dangers are particularly acute in the present situation where the Commission is seeking to apply this discredited approach to sales of gas by an independent producer. While this Court has held in *Phillips Petroleum Co.* v. *Wisconsin*, *supra*, that a producer's sales of gas for resale in interstate commerce are subject to rate regulation under the Natural Gas Act, it must be borne in mind that these sales are, from a practical point of view, at the extreme edge of the Commission's jurisdiction. All the other aspects of the gas production business are concerned primarily with the physical aspects of the production and gathering of gas and indeed, a producer's sales of gas are merely the culmination of his production activities. See *e.g.*, *Phillips Petroleum Co.* v. *Wisconsin*, *supra*, at 688 (Douglas, J., dissenting). Consequently, whereas the Commission may regulate a producer's interstate sales of gas, the proviso of Section 1(b) operates to deny it of control over all of his activities leading up to these sales. In these circumstances and in particular since these activities come within the proviso more clearly, if possible, than the gas leases involved in *Panhandle*, special care must be taken against implying powers in the Commission lest the "forbidden area" is invaded.

In any event, because as already shown, *supra*, pp. 14-15, the necessary result of requiring a producer to deliver more gas than he is willing by his application and contract to sell, either in terms of daily volume or time, is to compel him either to produce more gas or to allocate more of his production to the interstate market, it is obvious that such a requirement would invade "the production or gathering of natural gas" exemption. Under the clear teaching of *Panhandle*, such an invasion cannot be justified as necessary to provide continuity of service to ultimate consumers.

3. *The Commission's standards as to adequacy of service do not require that the producer certificates issued be unlimited in duration.* The court below appears to suggest that the Commission has in the past been able to assure the ultimate consumers of continued service, and that the effect of holding the Commission confined to the issuance of certificates of limited duration when so requested by the applicant would in some way disable the Commission from thereafter providing that assurance. Examination of the Commission's practices in this regard demonstrates that the court's reasoning is unsound as a practical matter.

In issuing a certificate to a pipeline company for new service the Commission has never required that it show the commitment of gas supplies adequate to provide that service indefinitely. Rather, it always has been satisfied with the gas supplies committed to the new service if they are adequate to provide the service for a period of up to 20 years. Since the Commission cannot compel a pipeline company to obtain additional gas supplies, it is clear that once the service is authorized, the Commission is without assurance that the pipeline company will be able to continue the service for a period of longer than 20 years.

Nor has the Commission uniformly insisted on a 20-year gas supply as a prerequisite to issuing to pipeline companies certificates for new service. In several recent cases, the Commission, while expressing the hope that the pipeline companies would subsequently acquire more gas reserves, has issued certificates authorizing new service when the companies' gas supplies were sufficient to provide service for substantially less than 20 years. Thus, in *Transwestern Pipeline Company*, Opinion No. 328 (issued August 10, 1959) 22 F.P.C. 391, 395-396, the Commission authorized the construction and operation of a new major pipeline system estimated to cost about $192,000,000, to serve the Southern California area even though Transwestern's gas reserves had a deliverability life of only thir-

teen years. And, in *Trunkline Gas Company*, Opinion No. 321 (issued May 22, 1959) 21 F.P.C. 704, the Commission granted a certificate for the construction and operation of a project costing over $80,000,000, despite the fact that the gas supply was sufficient only for "a maximum of 13 years and a minimum of 11.5 years. Although this is minimal, we consider the gas supply available to Trunkline to be reasonably adequate" (21 F.P.C. at 709). Such a gas supply, the Commission also stated, "meets the criteria of recent decisions" (21 F.P.C. at 708). See also, *Transcontinental Gas Pipe Line Corp.*, 14 F.P.C. 1, 8; *El Paso Natural Gas Co.*, 19 F.P.C. 393, 396-397; *Midwestern Gas Transmission Co.*, 21 F.P.C. 653, 656-657.

Since the Commission is thus willing to accept considerably less than a 20-year supply of gas as adequate assurance of continued service by a pipeline company, it is difficult to see how when a producer such as Sunray here seeks authorization to sell gas to a pipeline for a basic term of 20 years, the Commission can, consistently therewith, insist that the certificate must be of indefinite duration in order to assure continuity of service.

This is particularly so since whereas a local distributing company typically is dependent upon a single pipeline company for its supply of gas, a pipeline is not dependent upon a single producer for all or even a major portion of its gas supply. Rather, inasmuch as there are literally thousands of producers [13] as compared to the little more than a hundred pipeline companies, the normal situation is for a

[13] As of February, 1959, there were 4,945 gas sales contracts filed with the Commission by 3,300 different producers in the Southwest producing area alone. The actual number of producers is, however, substantially larger since the numerous working interest owners, when nonsignatory to the contract are not, under the Commission's regulations, permitted to file separately. See 18 C.F.R., 154.91 (b); *Episcopal Theological Seminary* v. *Federal Power Commission*, 269 F. 2d 228, 239 (C.A.D.C., 1959) certiorari denied, *sub nom.*, *Pan American Petroleum Corp.* v. *Federal Power Commission*, 361 U.S. 895 (1959).

pipeline to purchase gas from a large number of producers.[14] In these circumstances, the termination of a particular gas supply when the contract therefor expires will generally have little or no impact upon the pipeline's ability to continue to deliver gas to its customers. Moreover, since the pipeline is, of course, fully apprized of the expiration dates of its various gas purchase contracts, the pipeline has ample time within which to make arrangements, upon the expiration of an existing gas purchase contract, to replace by purchase from other sources, if necessary or appropriate, the gas supply which it had been receiving under the expired contract.[15]

C. The Natural Gas Act Does Not Embody a General Presumption That Certificates Are To Be Of Indefinite Duration

Underlying the position of both the Commission and the court below is the theory that the Natural Gas Act, by its very nature, contains a presumption that certificates issued under Section 7(e) are to be indefinite in duration and hence that certificates of limited duration may be issued only if the applicant makes a showing of special circumstances in justification thereof. This theory apparently is predicated on the assumption that the Natural Gas Act, in common

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[14] For example, of the 573 gas purchase contracts for interstate resale which United Gas Pipe Line Company, the buyer in the present case has, only 12 are with Sunray. Sunray's total interstate deliveries of gas in 1958 to United under these contracts aggregated only about 4% of the gas taken by United in that year for interstate sale. See Form 2 Report of United Gas Pipe Line to the FPC, 1958, at pp. 89-90.

[15] While not all producer gas sales contracts are for 20 years, examination of the producers' contracts filed with the Commission as of July, 1959, shows that about 84% are by their terms effective for 20 years or more. As far as Sunray is concerned, about 86% of the total gas delivered by it in interstate commerce is under contracts for a primary term of 20 years or more. Moreover, just as the Commission considers the life of the gas reserves of pipeline companies in deciding whether to authorize new service by them, so also may the Commission take into account the duration of the producer's gas sales contract in determining whether the sale contemplated by the contract is required by the public convenience and necessity. In other words, the Commission can at the outset determine whether the term of the sale as proposed is such as to provide adequate continuity of service.

with other regulatory statutes, embodies broad regulatory concepts.

The fact is, however, that because of the special problems and needs of the natural gas industry, Congress did not incorporate these concepts in the Natural Gas Act. Unlike other regulatory statutes, the Natural Gas Act preserves the integrity of private contracts and vests in the Commission only the general authority to supervise and review these contracts to assure that their provisions as agreed upon by the parties are in accord with the public interest. Thus, far from vesting the Commission with broad powers to disregard contracts, the Act's basic scheme is to require the Commission generally to respect private contracts.

Once this fundamental difference between the Natural Gas Act and other regulatory statutes is recognized, it becomes plain that there is no presumption that certificates are to be indefinite in duration in disregard of the applicant's contract; to the contrary, the presumption is that normally the certificate is to be issued only as applied for. Consequently, when, as here, an applicant seeks authority to sell gas in the interstate market for a period of time coextensive with the life of his sales contract, the Commission is not free to issue a certificate for a longer period of time.

1. *The Natural Gas Act preserves private contracts.* *(a) This Court has already so held in Mobile.* In *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), this Court has already pointed out that the Natural Gas Act differs from other regulatory statutes in that it preserves the integrity of private contracts, leaving to the Commission the duty generally of supervising those contracts in the public interest. That case involved the right of a pipeline to file new schedules with the Commission increasing its rates to the purchaser in disregard of the provisions of their contract. While recognizing the

important part played by contracts in the gas industry as compared to the railway industry (See Brief for Federal Power Commission in No. 31, October Term, 1955, at pp. 52-53), the Commission nevertheless claimed that the Act permitted such a unilateral filing. In support thereof, the Commission stressed the scheme of the Act (*id.* at pp. 18*ff*) and urged at great length that the Natural Gas Act, in common with the Interstate Commerce Act and the utility statutes of many states, denied, in effect, any validity to private contracts between the regulated utility and those served by it (*id.* at pp. 46-80).

This Court took a different view of the matter and rejected the position advanced by the Commission. The Court expressly ruled that because of the gas industry's special needs, the Natural Gas Act, unlike other regulatory statutes, preserved the integrity of the contracts and vested only limited authority in the Commission (350 U.S. at 338-339):

> In construing the Act, we should bear in mind that it evinces no purpose to abrogate private rate contracts as such. To the contrary, by requiring contracts to be filed with the Commission, the Act expressly recognizes that rates to particular customers may be set by individual contracts. In this respect, the Act is in marked contrast to the Interstate Commerce Act. *** only a relatively few wholesale transactions are regulated by the Natural Gas Act and these typically require substantial investment in capacity and facilities for the service of a particular distributor. Recognizing the need these circumstances create for individualized arrangements between natural gas companies and distributors, the Natural Gas Act permits the relations between the parties to be established initially by contract, the protection of the public interest being afforded by supervision of the individual contracts, which to that end must be filed with the Commission and made public.

And in dealing with the immediate question involved, the Court went on to explain how the rate provisions of the Act were entirely consistent with the Act's limited scope:

*** The Act merely defines the review powers of the Commission and imposes such duties on natural gas companies as are necessary to effectuate those powers; it purports neither to grant nor to define the initial rate-setting powers of natural gas companies. (350 U.S. at 341).

• • • •

*** The basic power of the Commission is that given it by § 5(a) to set aside and modify any rate or contract which it determines, after hearing, to be 'unjust, unreasonable, unduly discriminatory, or preferential.' This is neither a 'rate-making' nor a 'rate-changing' procedure. It is simply the power to review rates and contracts made in the first instance by natural gas companies and, if they are determined to be unlawful, to remedy them. *** (*Ibid.*)

• • • •

*** In short, the Act provides no 'procedure' either for making or changing rates; it provides only for *notice* to the Commission of the rates established by natural gas companies and for *review* by the Commission of those rates. The initial rate-making and rate-changing powers of natural gas companies remain undefined and unaffected by the Act.

All of the relevant provisions of the Act can thus be fully explained as simply defining and implementing the powers of the Commission to review rates set initially by natural gas companies, ***. (*id.* at 343) [Italics in the original]

Mobile thus makes clear that the Natural Gas Act is one of limited regulation of natural gas companies; that the Act preserves the integrity of private contracts and the Commission's power with regard thereto is restricted, as far as rates are concerned, to supervisory review to assure that they are not unjust and unreasonable. The Commission may change contract rates as filed with it only upon finding, based upon evidence developed at a hearing, that the rates do not accord with the standards set out in the Act.

The Commission appears to suggest that *Mobile* did not hold that the Natural Gas Act preserved contracts generally, but rather was intended to apply only to situations

involving rate changes. While it is true that the immediate question in *Mobile* concerned the Act's impact upon privately agreed-upon rates, the opinion itself leaves little room for doubt that the Court intended to define generally the interrelationship between the Natural Gas Act and private contracts. This is clear from (1) the statement (already quoted above, p. 30, 350 U.S. at 338):

> In construing the Act, we should bear in mind that it evinces no purpose to abrogate private rate contracts as such. ***

followed by an elaboration thereon and (2) the notation at the beginning of the very next paragraph (*id.* at 339):

> The provision of the Natural Gas Act directly in issue here is § 4(d), ***.

The fact, that the Court first discusses the Act's impact upon private contracts and then turns to the issue directly involved, makes clear, we believe, the Court's purpose that the rulings about the Act's preservation of private contracts were to be of general applicability and to set out the context in which the Court was deciding the particular question immediately presented. So viewed, the Court's rulings about the Act's limited scope are fully applicable here.

(b) *Independently of Mobile, the Natural Gas Act clearly does not abrogate private contracts.* (i) *The Act and Its Legislative History.* Even if the teaching of *Mobile* were not such as to establish that private contracts are preserved generally by the Natural Gas Act, this conclusion, we believe, must be reached upon a consideration of the matter as a question of first impression before the Court. It is settled principle that a statute will not be construed as nullifying private contracts unless it contains "clear authorization" (*Federal Power Commission v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 249 (1954)), or imperatively requires such a result. *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 437 (1907); see,

also, *Shaw* v. *Railroad Co.*, 101 U.S. 557, 565 (1880); *American District Telegraph Co.* v. *Kittelson*, 179 F. 2d 946, 953 (C.A. 8, 1950). For example, in *Niagara Mohawk*, where the Commission urged that the Federal Water Power Act had abolished private proprietary rights to use the waters of a navigable stream for power purposes, this Court, rejecting this interpretation, held (347 U.S. at 251):

> *** We find nothing in the Federal Water Power Act justifying such an interpretation. Neither it, nor the license issued under it, expressly abolishes any existing proprietary rights to use waters of the Niagara River. *** On the contrary, the plan of the Act is one of reasonable regulation of the use of navigable waters, coupled with encouragement of their development as power projects by private parties. [footnote omitted]

So, too, with the Natural Gas Act, there is nothing either in the Act itself or its legislative history suggesting any purpose to nullify private contracts. Rather, the Act's legislative history and purpose strongly indicate a contrary intention. Congress was fully apprized during its consideration of possible natural gas legislation that virtually all relations between companies in the gas industry had long been founded upon long-term contracts. The report of the Federal Trade Commission on that industry abounds with references and data concerning the contracts of natural gas companies, most of them for long terms. See Federal Trade Commission, *Final Report to the Senate of the United States*, Sen. Doc. 92, 70th Cong., 1st Sess., Part 84-A at *e.g.* pp. 164*ff*, 208*ff*, 244, 479*ff*.[16] "It was at the time of the passage of the Act, and is now, a common and usual practice for gas companies to contract for all sales or transportation of natural gas; those companies which sold otherwise were exceptions." [17]

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[16] The Federal Trade Commission reports are expressly referred to in Section 1(a) of the Natural Gas Act.

[17] See Brief for the Commission in *Mobile Gas Service Corp.* v. *Federal Power Commission*, C.A. 3, No. 11280, at pp. 10-11.

Yet, in spite of its awareness of the industry's contracting practices, there is nothing anywhere in the hearings, Committee reports or debates on the floor of the Congress with reference to the proposed legislation which in any way even suggests that the Act as originally enacted in 1938 or as amended in 1942 was to destroy these contracts. Certainly, if there were any intention to achieve such a result, there would have at least been some debate on the matter. Not only was there no discussion of the Act's effect on the industry's contracting practices but there was no opposition to the legislation, either as originally enacted or as amended, even on the part of the gas companies themselves (see 81 Cong. Rec. 6725; Hearings before the House Committee on Interstate and Foreign Commerce, on H.R. 5249, 77th Cong., 1st Sess. at pp. 3, 27).

Nor was abrogation of private contracts necessary to the achievement of the Congressional purpose in the enacting of the Natural Gas Act. In the first place, the report of the Federal Trade Commission on the natural gas industry did not list the industry's contracting practices among the evils as to which it regarded corrective legislation necessary or appropriate. See Federal Trade Commission, *Final Report to the Senate of the United States*, Sen. Doc. 92, 70th Cong., 1st Sess., Part 84-A at pp. 607-617. In the second place, the industry's contracting practices were far removed from the problems which the Natural Gas Act was designed to meet.

Prior to the enactment of the Natural Gas Act, this Court had held in *Public Utilities Commission* v. *Attleboro Steam and Electric Co.*, 273 U.S. 83 (1927), (see, also, *Missouri* v. *Kansas Natural Gas Co.*, 265 U.S. 298 (1924)), that the state regulatory commissions were without power, under the Constitution, to pass on the rates charged in interstate commerce for the wholesale sale of gas to local distributing utilities. Since these rates were, thus, beyond the reach of the state regulatory bodies and purchased gas was a substantial element in the costs of their local utilities and hence

in the rates charged by them, the state commissions were handicapped in their efforts effectively to regulate the rates paid by the ultimate consumers.

It was to close the gap revealed by the *Attleboro* case that Congress enacted the Natural Gas Act. By so closing the gap, Congress intended federal regulation to complement state regulation, ~~and in~~ *this way*, to protect the ultimate consumers from exploitation. As was stated by the House Committee in reporting the bill which became the Natural Gas Act: "The basic purpose of [the Act] is to occupy this field in which the Supreme Court has held that the states may not act. *** Your committee believes that this legislation is highly desirable to fill the gap in regulation that now exists by reason of the lack of authority of the State Commissions." Report of the House Committee on Interstate and Foreign Commerce on H.R. 6586, H. Rep. No. 709, 75th Cong., 1st Sess., pp. 2-3;[18] see, also, H. Rep. No. 2651, 74th Cong., 2d Sess., pp. 1-3. Inasmuch as the local commissions were already dealing with the public utility phases of the natural gas business, *i.e.*, service to the ultimate consumers and the Gas Act was only complementary thereto and concerned solely with the comparatively few wholesale interstate gas transactions, it appears obvious that there was no need, as far as Congress was concerned, to provide in the Gas Act for anything more than Commission supervision and review of the contracts for these interstate sales.

This is particularly so since in enacting the Natural Gas Act, Congress evidenced concern for the legitimate interests of the natural gas companies, as well as those of the ultimate consumers and made appropriate adjustments to reconcile the needs of both. *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 513-514

[18] This report was incorporated verbatim in the Report of the Senate Committee on Interstate Commerce, S. Rep. No. 1162, 75th Cong., 1st Sess., accompanying H.R. 6586.

(1949); *Gulf Oil Corp.* v. *Federal Power Commission*, 255 F. 2d 556, 557 (C.A. 5, 1958). As stated in the *Mobile* case, *supra*, 350 U.S. at 344:

> The Act *** affords a reasonable accommodation between the conflicting interests of contract stability on the one hand and public regulation on the other.

(ii) Administrative Practice. Any remaining doubt that the Act preserved private contracts generally is dissipated by the Commission's own practice. For several years, after the enactment of the Natural Gas Act, the Commission accepted for filing as rate schedules, the individual contracts which the pipelines had entered into with their purchasing distributors. In 1948, the Commission issued Order No. 144, under which it required the pipelines to convert from the individual contract method of fixing rates to a so-called tariff-and-service-agreement method. 18 C.F.R. 154.1 *et seq.* In requiring this conversion, however, the Commission not only recognized that a pipeline's relations to its purchasers were based on contract, but, of particular significance here, it accepted as well that their contractual relationships were only for an agreed-upon period of time.

This acceptance is implicit from the form that the Commission's new system took, *i.e.*, tariff and *service agreements*. Also, it is explicit in the various provisions of Order No. 144 which are virtually honeycombed with references and requirements with regard to contracts and service agreements. Thus, for example, in Section 154.40, Order No. 144, provides:

> There shall be submitted as part of the tariff an unexecuted copy of each form of *service agreement*. The *service agreement* forms should provide for insertion of such items as the name of the purchaser, service to be rendered, area to be served, maximum obligation to deliver, delivery points, delivery pressure, applicable rate schedules by reference to the tariff, *effective date and term*, and identification of any prior *agreements* being superseded.

Section 154.41 of the Order continues in the same vein:

> (a) The index of purchasers shall contain an alphabetical list of all purchasers under the tariff, showing for each the rate schedule or schedules under which service is rendered, and the following information concerning the *contract*: (1) the date of execution, (2) the effective date and (3) *the term*.

And Section 154.85 similarly states:

> Each *contract*, which is now filed as an effective rate schedule, may be continued in effect and shall be considered as an *executed service agreement* to the extent that the provisions thereof are not superseded by or in conflict with other applicable provisions of the rate schedules and general terms and conditions of the tariff, *until such contract expires by its presently provided terms or is replaced by an executed service agreement in a form contained in the tariff*: *** Provided further, however, That *agreements* intended to effect a change or amendment in such contract may be made only by the execution of a form of *service agreement* contained in the tariff.

The Commission's acceptance that a pipeline's relations with its purchasers were based on contracts, which had an agreed-upon life, is further evident from the fact that the Commission has in numerous instances approved for filing tariffs and forms of service agreements, which provide, in so many words, that the pipeline will not be obligated to sell gas to a customer with whom the pipeline does not have an executed service agreement. See, *e.g.*, Tennessee Gas Transmission Co., FPC Gas Tariff, Sixth Revised Volume, First Revised Sheet No. 4*ff*; Original Sheets Nos. 109-111; Texas Eastern Transmission Company, FPC Gas Tariff, Second Revised Volume No. 1, First Revised Sheet No. 6*ff*, Seventh Revised Sheet No. 89*ff*; Michigan Wisconsin Pipe Line Company, FPC Gas Tariff, First Revised Volume No. 1, Original Sheet No. 5; Southern Natural Gas Company, FPC Gas Tariff, Sixth Revised Volume No. 1, Original Sheet No. 5*ff*, Original Sheets Nos. 54-57.

Finally, it is also relevant in this regard that in *United Gas Pipe Line Co.* v. *Federal Power Commission*, 181 F. 2d 796 (C.A.D.C., 1950) certiorari denied, 340 U.S. 827 (1950), which involved an attempt to obtain review of Order 144, the Commission, in assuring the Court of Appeals that the Order operated prospectively only, advised that it interpreted "Order No. 144 as not authorizing the making of any change in an effective rate, charge, or *contract provision*, without compliance with the Natural Gas Act, as amended." (181 F. 2d at 799, fn. 6). See, also, *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 142 F. 2d 943, 954 (C.A. 10, 1944), affirmed, 324 U.S. 581 (1945); *Mobile Gas Service Corp.* v. *Federal Power Commission*, 215 F. 2d 883 (C.A. 3, 1954), affirmed, 350 U.S. 332 (1956); *Sierra Pacific Power Co.* v. *Federal Power Commission*, 223 F. 2d 605 (C.A.D.C., 1955), affirmed, 350 U.S. 348 (1956).

2. *The Act's preservation of private contracts negates any presumption that certificates are generally to be of indefinite duration.* By thus preserving the integrity of private contracts, the Natural Gas Act differs markedly in basic thrust from other regulatory statutes. Whereas the philosophy of other such statutes embraces broad regulatory concepts with a concomitant presumption of general service obligations, the preservation of private contracts of necessity, we believe, nullifies the existence of such a presumption as far as the Natural Gas Act is concerned.

At the outset, it is noteworthy that the absence of such a presumption would not be inconsistent with the regulation of the natural gas industry in the public interest, as contemplated by Section 1(a) (App. 53) of the Natural Gas Act. It has long since been established that the regulation of businesses affected with a public interest does not necessarily invoke broad regulatory concepts. To the contrary, the regulation of such businesses may vary widely in scope, with the precise scope of the regulation provided in a particular statute being adapted to the needs for, and the pur-

poses of, the regulation. See, *e.g.*, *Nebbia* v. *New York*, 291 U.S. 502, 531-536 (1934).

On the other hand, the preservation of private contracts is inconsistent with the existence of such a presumption. As already noted by this Court in *Mobile*, 350 U.S. at 339; *supra*, p. 30, by virtue of such preservation, the Commission's functions under the Act are perforce limited to those of review and supervision in the public interest. Indeed, the Commission itself has, in another context recognized that its responsibilities under the Natural Gas Act were so restricted:

> This Commission has repeatedly been periodically admonished that its functions under the regulation provided by the Natural Gas Act are of limited scope; that it does not initiate, but reviews. *** (see Brief for the Commission in *Oklahoma Natural Gas Company* v. *Federal Power Commission*, C.A.D.C. No. 13,783, at p. 11).

Since the Commission may not itself initiate new or additional service or sales, it follows, *a fortiori*, that the Act does not contain any built-in presumption under which the Commission may generally require an applicant for a certificate to sell more gas than his contract embraces.

In addition, the invocation of the Act's preservation of contracts in *Mobile* resulted in the rejection of a rate filing made by a natural gas company because not authorized by its contract. And in the companion case, *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956), the Court further ruled that the existence of a contract precluded a rate increase based solely on the fact that the contract rate "yields less than a fair return on the net invested capital" (350 U.S. at 354-355). Since the Act thus contemplated that a natural gas company should be bound by the burdens of its contracts, it follows that the Act also envisioned that such a company should not generally be required to sell gas beyond the terms of its contracts. There is nothing in the Act or its legislative history which in any

way even suggests a Congressional intent to provide anything other than an even-handed preservation of private contracts. Therefore, for this reason as well, with the Act accepting private contracts as the underlying basis of regulation, there can be no general presumption, under which natural gas companies may in the ordinary course be required to deliver more gas than they agreed to sell beyond the term provided in their contracts with their purchasers.

The existence of such a general presumption would also be inconsistent with the fact that the nature of the natural gas industry is such that it would be highly unusual for sales of gas to be made other than in accordance with a contractual agreement between the parties. See, *supra*, p. 33. Since the reports of the Federal Trade Commission fully apprized Congress of these characteristics of the gas industry (*supra*, p. 33), Congress could hardly have intended to invest broad authority in the Commission to issue certificates extending beyond the life of the applicant's sales contract and, therefore, generally to compel sales without any contractual foundation at the same time that it enacted regulations predicated on the continued integrity of the industry's contracts.

This is particularly so because to the parties to the contract, the provisions of a gas contract as to duration are frequently as important as its provisions as to rates.[19] Mr. McCarroll, Sunray's gas sales manager, made this clear when he testified (R. 17-18):

> Q. Mr. McCarroll, therefore, the term of the contract is a very important element of your negotiation?

[19] Indeed, it would appear that price is a function of the term of the contract. Thus, an examination of gas sales contracts filed with the Commission from the Southwest producing area, dated from 1953 through 1957, shows that the most typical price in contracts for terms of 15 to 19 years was only 93% of the average price in 20-year contracts, the most typical price for contracts with terms of 10 to 14 years was only 81% thereof whereas for contracts with terms of less than 10 years, the average price was only 65%.

A. We feel that it is, yes, sir.

Q. And the other factors which are of importance are the quantity of gas dedicated?

A. Yes. That has a bearing on it.

Q. Price is an important consideration, is it not?

A. Certainly.

* * * *

Q. So that if having made a contract for a term of years, that particular term of years is set aside or extended or changed from that which was agreed upon, would you consider that a change in the contract which would not have been consistent with those other provisions which have been agreed upon?

A. In most cases, yes.

Q. Would you in this case?

A. Definitely in this case.[*]

Since the term of the contract is thus a crucial element thereof, a presumption under which the Commission could generally disregard the contract's life as fixed by agreement of the parties would be in irreconcilable conflict with the Act's preservation of contracts.

Agreeable to the absence of any such general presumption, Section 7(e) does not contain any broad authorization to the Commission to issue certificates for periods of time longer than requested by the applicant. As shown, *supra*, pp. 12-13, not only is there nothing in Section 7(e) authorizing the Commission to disregard the term of the contract but in fact that Section in express terms limits the Commission's power to the issuance of certificates granting "the whole or any part of the ***, sale, ***, covered by the application,".

[*] Some of the reasons why the term of its gas sales contracts is of such importance to a producer of natural gas are discussed in detail at pp. 44-51, *infra*.

Consequently, as with the rate aspects of private contracts, the Commission is without sweeping authority under Section 7(e) to require a new sale of gas or the extension of an existing sales contract. Rather, its general authority is restricted to reviewing the sales agreement, for which the certificate is sought, for the purpose of ascertaining whether the sale of gas as proposed is in the public interest. Thus, neither as to rates nor with regard to the issuance of certificates under Section 7(e) does the Natural Gas Act nullify the contracts entered into by the parties; as to neither does the Act authorize the Commission freely to override or disregard the parties' agreement. On the contrary, as to both, the Commission is required generally to respect the contracts entered into by the parties. Its only general authority is to supervise and review these contracts.

The Commission seeks to reconcile the Act's preservation of private contracts with its assertion of a presumption that certificates are generally to be unlimited in duration by urging (Br. in Opp. in No. 208 at pp. 8-9):

> "... by granting an unlimited certificate the Commission does not fix the term or overturn the term fixed by the contract between the parties; rather, it authorizes the sale for an unlimited term so that the consuming public may be protected, leaving open the question of whether the service may be abandoned (on the date fixed for the end of the contract) for determination under Section 7(b) of the Act (pertaining to abandonment) upon the facts which are relevant at that time."

Apart from the fact that the Commission's standards as to continuity of service do not require that the issuance of certificates of indefinite duration (see, *supra*, pp. 26-28), this argument is internally unsound, for basically it is a claim that the Act simultaneously preserves and overrides private contracts. This is apparent from the fact that under the Commission's theory, the parties agreement as to the term of the contract, whether it be for 20 years, 10 years, 5 years,

or even one month becomes immaterial; in each instance, the certificate issued would, under the Commission's approach be indefinite in duration and the producer required to deliver gas without regard to the term of the contract until the Commission authorizes discontinuance of the sale. The comparable argument advanced by the Commission in *Mobile* was given short shrift; as the Court of Appeals for the Third Circuit, the lower court in *Mobile*, commented:

> "*** Actually the Commission time and again insists that it does not claim that the Congress in the Natural Gas Act intended to set aside contracts completely. It states flatly that the Act shows no such thought. Nevertheless on the theory of 'scheme of regulation' it argues that it be permitted to construe Section 4(d) so that in reality that consequence is obtained. *** (*Mobile Gas Service Corp. v. Federal Power Commission*, 215 F. 2d 883, 888 (C.A. 3, 1954), affirmed, 350 U.S. 332 (1956)).

This argument is no more valid when made by the Commission here than it was when it was advanced by the Commission in *Mobile*.[21]

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[21] The cases cited by the Commission (Br. in Opp. in No. 208 at pp. 6-8) are not helpful here. *Pennsylvania Water & Power Co. v. Federal Power Commission*, 343 U.S. 414 (1952), turns on the peculiar facts of that case and provisions of the Federal Power Act, not present in the Natural Gas Act. *Bel Oil Corp. v. Federal Power Commission*, 255 F. 2d 548 (C.A. 5, 1958), certiorari denied, 358 U.S. 804 (1958); *Mississippi Power & Light Co. v. Memphis Natural Gas Co.*, 162 F. 2d 388 (C.A. 5, 1947), certiorari denied, 332 U.S. 770 (1947); and *Cities Service Gas Producing Co. v. Federal Power Commission*, 233 F. 2d 726 (C.A. 10, 1956), certiorari denied, 352 U.S. 911 (1956), all concerned changes in contract rates during the effective term of the contract. *J. M. Huber Corp. v. Federal Power Commission*, 236 F. 2d 550 (C.A. 3, 1956), certiorari denied, 352 U.S. 971 (1957), involved a producer who, in resisting regulation, had refused to apply for a certificate although his contract was for the life of the reserves and at the time, the remaining term of the contract was estimated at approximately ten years. The pertinent holdings of the Court of Appeals for the Tenth Circuit in the *Sunray* cases cited by the Commission are now before this Court in the instant case; in the first *Sunray* case, this Court did not reach the question because the Tenth Circuit had also invaded the administrative sphere in reaching its result and the Commission had acquiesced in reversal on this phase of the case. See, *Sunray Mid-Continent Oil Co. v. Federal Power Commission*, 353 U.S. 944 (1957), reversing 239 F. 2d 97 (1956).

D. Certificates Coextensive With the Term of Their Sales Contracts Are Essential to Legitimate Interests of the Producers and on Balance Are in the Public Interest

As already indicated, both Congress and this Court have recognized that because of the special problems of the natural gas industry, the regulation provided in the Natural Gas Act was not to abrogate the contracts on which the relationship between the companies have long been based. Just as the nature of their business requires the pipeline companies to have long-term contracts (up to twenty years) with their suppliers and purchasers, *i.e.*, to obtain financing of the magnitude needed to construct major pipeline systems, so too, the nature of the gas production business dictates that the producers not be bound to sell gas beyond the term of their contracts.

Basic to the production of natural gas are the facts that oil is frequently produced in conjunction with gas, and oil, unlike natural gas is not subject to federal regulation. Since oil is both a joint and competing product with natural gas, the legitimate interests of the producers and their investors require that a producer be able periodically to review and revise, if necessary, his gas sales commitments in light of their impact upon his financial stability as of a single enterprise engaged in the production and sale of both natural gas and oil.

Unlike any other regulated industry, the production of natural gas is fundamentally extractive in nature; gas can be produced only where and under the conditions in which it is found. In addition, the gas producer has depletable assets which are limited in quantity by nature, so that the continued availability of gas in the future is dependent upon the discovery, through exploration and development, of additional gas reserves. As a result, not only is the gas production business extremely risky and highly specula

tive,[22] but the location of a producer's production activities are fixed by the location of his gas reserves and may be scattered in one or more fields. Because his production is fixed by the location of his reserves, a producer, when he enters an agreement to sell gas, usually commits to that contract only gas from reserves located under specified acreage or leases; rarely, if at all, does a producer ever undertake to sell gas from his reserves generally. The consequence is that, when a producer owns more than one reserve—and there are many producers who own only one—his total sales of gas are made up of a series of contracts, usually one for each reserve for which he is selling gas.

Moreover, the fact that it is an extractive industry dictates the form which the gas production from each well takes. A producer explores for both gas and oil and if he is successful may find either or both in the same field. If he finds a formation bearing gas alone, he will sell it as gas. If he finds oil, it is likely that he will produce gas with the oil and after separation will sell the oil and the gas separately. Gas, if produced from either an oil sand or a gas sand will, if it is "wet" gas, be processed through a plant to remove the liquids and the residue gas will then be sold to a gas producer. All of these operations are from interlocking oil and gas economic ventures, varying in cost greatly from field to field.

With the cost and conditions of gas production thus fluctuating widely from field to field, it is obvious that there are sound business reasons for producing gas from some fields in preference to others. Moreover, as new reserves of gas

[22] Eight out of every nine wildcat wells drilled, on the average, are totally dry, and forty per cent of all wells drilled are dry. See *Bulletin of the American Association of Petroleum Geogolists*, issue of June, 1959, at p. 1128 and *World Oil*, February 15, 1959, at p. 93. Moreover, it is noteworthy that as the industry drills deeper to find new hydrocarbons, the cost per foot drilled rises faster than the increase in depth. To illustrate, a 16,000-foot well costs about six times as much as an 8,000-foot well. See American Petroleum Institute, Mid-Continent Oil and Gas Association and Independent Petroleum Association of America, *Joint Association Survey of Industry Drilling Costs, 1955 and 1956*, tables following p. 13.

are discovered, a field which originally seemed to be a good one from which to produce gas, may cease to come within that category. This is particularly so since with the gradual exhaustion of a field it becomes more difficult and costly to keep production at a constant level. Consequently, while a producer, when he enters into a long-term contract to sell gas, has in effect made the managerial decision that as of that time, the field is one from which the production and sale of gas is warranted, the passage of time during which the new gas discoveries are made could very well result in making unwarranted further production of gas from that field as compared to other fields from which gas is or could be produced and sold. Since, as stated, *supra*, p. 45, the producer typically contracts to sell gas from a specified acreage, not from his general gas production, the producer has a legitimate business interest in having his obligation to sell gas terminate with the expiration of the contract so that at that time, he may reassess the situation as to gas production from that field in light of the conditions then prevailing.

The geology of the gas production business also gives rise to further reasons why a producer should not be bound to continue selling gas beyond the term of his contracts. Since, as already noted, *supra*, p. 44, natural gas is frequently produced in association with oil, many producers of gas are also substantial producers and sellers of oil. Indeed, many of the producers originally were engaged primarily in the oil business, but with the vast bridge to the consuming markets created by the tremendous pipeline expansion of the last decade, the production and selling of natural gas has become an increasingly important segment of their business.

But the growth of the natural gas phase of his business has not been an unmixed blessing as far as the producer is concerned, for he has retained a substantial stake in the oil business. In contrast to his gas prices which are subject

to Commission control and regulation, oil prices are not subject to regulation; instead, they fluctuate with the interaction of demand and supply, both on a short-run and long-run basis. Hence, a producer needs to be able to control his production of oil in accordance with these fluctuations of demand and in view of the economic and geological interrelationship between his production of oil and gas, the producer cannot fully exercise that necessary control unless he is also able periodically to review and make fresh managerial decisions, on an over-all basis, with regard to his production of natural gas.

The producer's need to reconsider his production of natural gas periodically is further accentuated by the fact that oil and natural gas are competing fuels. While crude oil as it comes from the well may be broken down in a variety of hydrocarbons by refining, a major refined product is fuel oil commonly used for heating. Since a primary use of natural gas also is to provide heat, the producer is in the anomalous position of producing two competing fuels. As a result of this competition, the tremendously increased use of gas in the past decade has made substantial inroads in the market for fuel oil. Thus, on the basis of comparative heat content, natural gas produced in the seven-state Southwest producing area—the source of 75 per cent of the total domestic production of hydrocarbons—has increased its share of the market from 32.3 per cent in 1948 to 51.2 per cent in 1958; during the same period, oil's share of the market has decreased from 67.7 per cent in 1947 to 48.8 per cent in 1958. See, U.S. Bureau of Mines, *Minerals Yearbook:* 1951 at pp. 871, 947; *Minerals Yearbook:* 1958, Volume II at pp. 314, 359; *Annual Petroleum Statement No. 447*, p. 11; *Mineral Market Report*, MMS No. 2972, p. 2.

The Monthly Review of the Petroleum Situation, issued by The Chase Manhattan Bank, not only contains statistics similarly demonstrating the displacement of fuel oil by

natural gas [23] but explains that this has come about because (*id.*, issue of October, 1959 at p. 3):

> *** Its lower price tag enabled gas to capture a rapidly expanding share of the growth of the energy market. It also displaced fuel oils in existing markets. And from solid fuels it wrested large markets, a major portion of which might otherwise have been inherited by fuel oils.
>
> So long as gas continues to be freely available at prices which do not wholly reflect its primary product status, it is going to continue displacing fuel oils in current and future markets. And, since fuel oils have constituted as much as half the refinery production, the growing use of gas has gradually reduced the requirements for crude oil. ***

The effect of this displacement of fuel oil by gas has been to reduce the revenues of the oil-gas producers. This is so because, again on comparative heat content basis, the average wellhead price of gas is only one-fifth that of crude oil. See The Chase Manhattan Bank, *Future Growth of the World Petroleum Industry* (1958) at p. 13. As a result, "**** every time a consumer of oil converts to gas, or a new potential market for oil is captured by gas, the revenue to the oil industry is reduced to 20 per cent, or less, of what it would have been. Pointing up the significance of all this, the average wellhead value per barrel of oil and gas com-

[23] The June, 1959, issue of this *Review* shows (at p. 4):

GROWTH OF ALL PETROLEUM HYDROCARBONS

	1949	1959*	Change
	— Thou Bbls Per Day		
Domestic Production			
Crude Oil	5,045	7,300	+ 2,255
Nat. Gas & Gas Liquids**	3,080	6,750	+ 3,670
Total Domestic	8,125	14,050	+ 5,925
Imports	645	1,700	+ 1,055
Total	8,770	15,750	+ 6,980

*Estimated
**Oil Equivalent

bined, in terms of constant 1957 prices, has declined 13 per cent during the postwar period. This has happened because the production of low value gas hydrocarbons has grown more than twice as fast as the output of the higher value oil hydrocarbons" (*Ibid.*).[24]

One of the consequences of the displacement of higher price fuel oil by lower price gas has been to contribute to the over-supply of oil in the free world in recent years and a consequent weakening of oil prices. The result is to create substantial problems for the oil-natural gas production business generally in undertaking the expansion which has been predicted for it during the next decade. In the words of The Chase Manhattan Bank, *Monthly Review of the Petroleum Situation* (issue of July, 1959 at p. 2):

> Over the past 10 years the domestic petroleum industry found it necessary to spend $53 billion for capital account. And the expansion indicated for the next decade is expected to require an additional expenditure of at least $75 billion. A major portion of these funds must be generated from operations and the balance supplied in the form of borrowed and risk capital. But how *** is the industry going to generate and attract such funds if gas, which yields relatively little revenue, increasingly displaces oil which produces proportionately much more revenue?[25]

While the impact of these increased sales of natural gas upon the oil segment of the oil-natural gas production busi-

[24] The adverse impact upon a producer's revenues resulting from increased sales of natural gas at the expense of higher priced oil is graphically illustrated as follows: with 70 units of oil being sold at 50 cents a unit (for a total of $35.00) and 30 units of gas being sold at 10 cents a unit (for a total of $3.00), the average unit price of oil and gas is 38 cents a unit ($35.00 plus $3.00 divided by 100 equals 38 cents). However, when the quantity of gas increases to 50 units (giving a total of $5.00) and the sales of oil are correspondingly reduced to 50 units (yielding $25.00), the revenue received, if the prices remain the same, is reduced to an average of 30 cents a unit ($5.00 plus $25.00 divided by 100 equals 30 cents).

[25] Further consequences of this displacement, it has been predicted, might be to reduce the incentive to search for more reserves and to cause producers increasingly to shift their exploratory activities to foreign areas where the combination of economic factors are relatively better. See The Chase Manhattan Bank, *Monthly Review of the Petroleum Situation*, (issue of July, 1959 at p. 2).

ness has varied from company to company depending on the particular circumstances of each company, each producer needs periodically to reconsider the volume of his gas production both in light of the entire picture and expressly with reference to its impact upon his particular company and its investors. In some instances, it may be appropriate for him to divert his gas to other uses. In other instances, the situation may be such as to warrant continuing to sell gas as he has been doing in the past and perhaps even to increase his gas sales.

The important thing is that because of the competition of these jointly produced fuels, the producer periodically must reconsider his natural gas production and sales in order to make those adjustments, if any, which are appropriate to the particular circumstances of his combined business. Enabling the producer at the termination of a gas sales contract to make a fresh reappraisal of the production of gas from the field involved, therefore, is justified in order to accord proper balance to the investor interest in the oil-natural gas production business. As this Court stated, in recognizing the needs of the pipeline companies expeditiously to reflect increased costs (*United Gas Pipe Line Co. v. Memphis Light, Gas & Water Division*, 358 U.S. 103, 113 (1958)):

> ••• Congress, in so drafting the statute, was not only expressing its conviction that the public interest requires the protection of consumers from excessive prices for natural gas, but was also manifesting its concern for the legitimate interests of natural gas companies in whose financial stability the gas-consuming public has a vital stake. Business reality demands that natural gas companies should not be precluded by law from increasing the prices of their product whenever that is the economically necessary means of keeping the intake and outgo of their revenues in proper balance; otherwise procurement of the vast sums necessary for the maintenance and expansion of

> their systems through equity and debt financing would become most difficult, if not impossible. ***

See, also, *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944); *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 513 (1949); *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 334 (1956).

Finally, under the Commission's view, approved by the court below, a producer would have to deliver gas to its purchasing pipeline company after the expiration of its contract without any corresponding obligation upon the pipeline to take the gas. The pipeline would thus be free to stop taking gas from the producer, but the latter would not be free to discontinue the sale to the purchaser. There are, however, literally thousands of producers compared to a relatively few pipeline companies and a pipeline company is not dependent upon a single producer for gas supply, but typically purchases gas from a number of producers (*supra*, pp. 27-28). Consequently, apart from the anomaly of such a situation particularly when viewed in light of the common provision in the pipeline tariffs, approved by the Commission, relieving it from delivering gas to the distributor in the absence of an executed service agreement (see, *supra*, p. 37) the result would be to introduce wide areas of instability of relationships between producer and pipeline. Such instability is not in the public interest; to the contrary, in *Mobile*, this Court has already recognized that stability of arrangements among the various segments of the industry is "essential to the health of the natural gas industry" (350 U.S. at 344), and so in the over-all public interest.[26]

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[26] The issuance of certificates coextensive with the term of the producer's contract will not create a gap in the Commission's rate jurisdiction. Under Section 7(e) the Commission has authority to impose reasonable rate conditions in connection with its issuance of certificates of public convenience and necessity. See *Signal Oil & Gas Co.* v. *Federal Power Commission*, 238 F. 2d 771 (C.A. 3, 1956), certiorari denied, 353 U.S. 923 (1957); *Atlantic Refining Co.* v. *Public Service Commission of the State of New York*, 360 U.S. 378, (1959).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed.

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APPENDIX

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The pertinent provisions of the Natural Gas Act, 52 Stat. 821 (1938), as amended by 56 Stat. 83 (1942), 15 U.S.C. §§ 717-717w, are as follows:

SECTION 1(a) As disclosed in reports of the Federal Trade Commission made pursuant to Senate Resolution 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

* * * *

SECTION 4(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract, relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect. *Pro-*

vided, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

SECTION 5(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however*, That the Commission shall

have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

* * * * *

SECTION 7(a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or

operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however*, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

* * * * * *

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the

provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

* * * *

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In the Supreme Court of the United States

October Term, 1960

SUBURBAN [illegible] COMPANY, [illegible]

v.

FEDERAL POWER COMMISSION

ON WRIT OF [illegible] TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 335

SUNRAY MID-CONTINENT OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION

OPINIONS BELOW

The orders of the Federal Power Commission (R. 86–90, 101–105) are reported at 19 F.P.C. 618 and 1107. The opinion of the Court of Appeals for the Tenth Circuit (R. 105–109) is reported at 267 F. 2d 471.

JURISDICTION

The judgment of the Court of Appeals was entered on May 27, 1959 (R. 109). The petition for a writ of certiorari was filed on August 22, 1959, and granted on November 9, 1959 (R. 110), 361 U.S. 880. The jurisdiction of this Court rests upon 28 U.S.C. 1254 (1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

An independent producer of natural gas applied for a certificate of public convenience and necessity, limited to the duration of its contract, to sell gas to a pipeline from stated reserves. The question presented is whether the Federal Power Commission is required to grant a certificate limited to that duration, in the absence of a showing by the producer that the public convenience and necessity requires such a limitation.

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717, *et seq.*, are set forth in the Appendix, *infra*, pp. 62–70.

STATEMENT

On March 11, 1957, petitioner, an independent producer of natural gas, filed an application with the Federal Power Commission for a certificate of public convenience and necessity, pursuant to Sections 7(c) and 7(e) of the Natural Gas Act (R. 20, 58). Petitioner sought authorization of the sale of gas to the United Gas Pipeline Company (United), for resale in interstate commerce in accordance with a contract dated January 1, 1957 (R. 25). The application requested a certificate authorizing the sale of gas covered by the contract (pp. 23–24):

> * * * to the extent, and only to the extent, that such gas is transported in interstate commerce for resale for the remainder of the term of said contract and as it may be renewed or extended, and that said certificate provide for its own expiration on the expiration of the said con-

> tract term so as to authorize Applicant to cease the delivery and sale of gas thereunder at that time * * *.

The relevant provisions of the contract and the proceedings below in connection with the application may be summarized as follows:

1. THE CONTRACT

United agreed to take, or, even if not taken, to pay for, a specified minimum quantity of gas during each "contract year." It also agreed to take, or to pay for, during each month of each contract year, a quantity of gas not less than 1/24 of the annual minimum in effect for that particular year. These obligations were conditioned upon the ability of petitioner to deliver the gas (R. 27, 65).

The annual minimum of gas was defined for the purposes of the contract as the "quantity of gas per contract year equal to the product of 45,625/1,000,000 times the quantity of Seller's Gas Reserves" in a stated area (R. 27, 65). The amount of such reserves was to be determined by the parties or by arbitration upon execution of the agreement and was thereafter subject to redetermination in the same way at least annually (R. 33), so that the annual minimum was not a fixed quantity. Moreover, petitioner was to maintain sufficient delivery capacity to enable it to deliver to United on each day of a contract year one and one-half times the daily average of the annual minimum in effect during that contract year, United having the right to buy up to that quantity of gas each day (R. 27-28). Upon agreement, United might take an even

greater quantity (R. 28) and, in certain specified circumstances, petitioner could require United to increase its withdrawals above the contract minimum (R. 29).

The primary term of the contract was specified to be a period of twenty years. It was provided that the term might be extended if United was unable to take delivery because petitioner elected to use the gas needed to meet the contract requirements for cycling, repressuring, or other similar gas injection operations (R. 30). There was also testimony on behalf of petitioner to the effect that the duration of the sales might be reduced if additional gas were not found in the area covered by the agreement, and United elected to take the gas at the maximum rate (R. 18–19).

2. PROCEEDINGS BELOW

Before the Commission, petitioner's application was consolidated for hearing with those of two other independent producers making related sales to United and with United's application for a certificate to construct facilities with which to take delivery of the gas (R. 86).

During the administrative hearings, petitioner's manager of gas sales explained that petitioner was seeking a certificate coextensive with the term of the contract because "that is the basis under which we contracted for this sale," that it is petitioner's policy to retain maximum control over the disposition of its natural gas, and that, in order to do so, it would prefer to sell on a day-to-day basis if possible (R. 15–16, 81). The presiding examiner concluded that the evi-

dence presented by petitioner and the other producer applicant seeking a limited-term certificate might "be fairly summarized by saying that those applicants would prefer not to be subject to regulation" (R. 82).

On February 3, 1958, following the completion of the hearing, the examiner authorized the issuance of a certificate of public convenience and necessity to petitioner for the sale of natural gas to United, subject to Commission review (R. 83). However, he declined to issue a certificate of limited duration as requested by petitioner, on the ground that the petitioner had not shown that the present or future public convenience and necessity required the issuance of a certificate so conditioned (R. 80–82, 84). The Commission affirmed this decision, by order dated May 9, 1958, saying, *inter alia*, that it agreed with the examiner that the petitioner's evidence did not support the issuance of a certificate of other than unlimited duration (R. 88).

In denying petitioner's application for rehearing, on June 21, 1958, the Commission added that, while it was authorized to grant a certificate for a limited term, "the record * * * must support the other features of the proposed project," and that, in considering a Section 7(c) application, it was essential to consider the policies embodied in Section 7(b) of the Act (the abandonment provisions) since the "Act should be interpreted as a whole, so as to give effect to rather than defeat its interrelated provisions and purposes" (R. 103). The Commission also noted that the certificate issued did not require petitioner

to render service in excess of that called for by the contract, pointing out that the "extent of the service the company must ultimately render will be determined at some future time if and when [petitioner] seeks permission to abandon service, a matter which we cannot and should not attempt to anticipate in this case" (R. 103).[1]

The Court of Appeals affirmed the Commission's order (R. 106–109). Recognizing that in *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 239 F. 2d 97, reversed in part and remanded, 353 U.S. 944,[2] it had held that in some cases legal, physical,

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[1] On June 26, 1958, petitioner filed with the Commission an acceptance of the certificate of public convenience and necessity. Petitioner stated, however, that by its acceptance it should not be precluded from pursuing its remedies under Section 19(b) of the Act (providing for judicial review). In approving this acceptance, on July 18, 1958, the Commission stated that it was "approved on the condition that if service commenced pursuant to the certificate issued to Sunray in Docket No. G-12211, when and if the order of the Commission issued May 9, 1958, is affirmed by a court of competent jurisdiction, then Sunray shall not terminate or abandon the service initiated without permission and approval of the Commission first had and obtained pursuant to Section 7(b) of the Natural Gas Act." *Sunray Mid-Continent Oil Co.*, 20 F.P.C. 58, 59. According to petitioner's F.P.C. Rate Schedule No. 159, it commenced service under its certificate on August 1, 1958.

[2] In that earlier *Sunray* case, the Court of Appeals found that the Commission had erred in concluding that it could never issue a certificate of limited duration, but nevertheless affirmed the Commission's order on the ground that petitioner had not made a showing which would warrant such a condition. As suggested by the Solicitor General on behalf of the Commission, this Court reversed that judgment on the ground that the Court of Appeals, having laid bare the Commission's

financial or other factors may be shown which would warrant conditioning certificates as to time in a proceeding pursuant to Section 7 (c) and (e) of the Act, it agreed with the Commission that no such showing had been made here. It concluded, moreover, that a natural gas company could not provide for the cessation of its service at a specified future date simply by contracting to sell gas only until that date.

SUMMARY OF ARGUMENT

Sunray sought authorization from the Commission to sell gas to United pursuant to contract and also to cease that service at the expiration of the contract. The record does not show that such a limitation on the duration of service would serve the public interest, but only petitioner's private interests. The Natural Gas Act does not, as petitioner maintains, require the Commission to grant certificates on terms specified by the producer, absent a showing that those terms are required by the present or future public convenience and necessity.

A. 1. The Commission, under Sections 7 (c) and (e) of the Act, has the power and duty to control the terms and conditions under which jurisdictional natural gas services may be initiated. The present comprehensive requirements of Section 7 for certificates of public convenience and necessity were added in 1942, four years after the Act became law, to strengthen Commission regulation and make it more ef

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error of law, had exhausted its jurisdiction and should not have gone on to affirm the Commission's order on a ground other than that on which the Commission rested its decision.

fective. Prior to that time, Commission control over initiation of service was limited to the then relatively unusual situation in which a company sought to enter a market already being served by another natural gas company. Thus, in most instances, the Commission could not control the capital expenditures incurred in the construction of facilities required to perform jurisdictional services even though it would later have to take those costs into account in determining the reasonableness of the rates for such services. The present certificate provisions were expressly enacted to plug this gap and to make Commission rate regulation more effective.

The language of Section 7(e) (App., *infra*, p. 68) is consistent with this purpose and clearly does not permit natural gas companies to dictate the terms upon which a certificate is issued, although the company is free to reject a certificate not acceptable to it. Petitioner's reliance on the language that the certificate shall authorize "the whole or any part of the operation, sale, service, * * * covered by the application" is misplaced, for, as the facts of this case show, a certificate will not—merely because unlimited in duration—require the performance of a *service* broader than that requested. Here, the Commission has authorized the *service* proposed.

2. Petitioner's contention that the Act foreclosed the Commission from issuing an unlimited term certificate ignores the Section 7(b) (App., *infra*, pp. 66-67) regulation of abandonment, upon which both the Commission and the court below relied. Section

7(b) is a necessary complement to the regulation of rates, for if a gas company could abandon its services at will, it could coerce Commission approval of otherwise unreasonable rates by threatening to abandon service upon which the public has become dependent. Even if a threatened abandonment would not immediately jeopardize the continuity of service, obtaining new supplies to replace the abandoned service would tend unnecessarily to increase costs that would be reflected in higher rates for the ultimate consumer. Such a result would be inconsistent with protecting "consumers against exploitation at the hands of natural gas companies," the primary aim of the Act. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 610.

While in a particular case a proposed abandonment of service might not have such consequences, the impact of an abandonment cannot be predicted years in advance and will depend on the facts relating to a pipeline's other sources of supply at the time service is to cease. If the Commission were required indiscriminately to issue certificates permitting cessation of service at the end of a contract term, the interests of the consuming public would be completely subordinated to the unregulated private interests of the producers.

The legislative history of Section 7(b) supports the view that the abandonment provisions are intended to complement and strengthen the Commission's regulation of rates and of service.

3. The Commission normally issues certificates of public convenience and necessity pursuant to Sec-

tion 7(c) and 7(e) without any time limitation and in this way retains its power to control abandonments under Section 7(b). Prior to initiation of a producer's service, no realistic appraisal can be made of whether a pipeline purchaser will need a particular supply of gas many years in the future. While final certificates of limited duration have been found to be required by the public interest in exceptional circumstances, petitioner has not shown the existence of comparable considerations here.

The only justification for a limited-term certificate given by petitioner is that continued service to United might not result in the most profitable disposition of its gas and that cessation of service should, therefore, be permitted at the end of the contract term, even if that would imperil the existence of the pipeline or the service to the gas-consuming public. But the dangers of untrammelled cessation of producer services emphasize the need for Commission scrutiny of abandonments at the time the services are proposed to be terminated. In such proceedings, the Commission can protect the public while also considering the economic needs of the producers.

B. Congress clearly intended the abandonment provisions of Section 7(b) to apply without regard to the existence of a contractual obligation to serve. As Congress was aware, virtually all relations in the gas industry are based on contracts. Moreover, the Act contemplated that services would continue to be initiated pursuant to contracts.

1. That Section 7(b) was not intended to be applicable solely during the terms of contracts appears

from its legislative context. The rate regulation provisions of Section 4(d) would have precluded unilateral abandonment of service rendered pursuant to a contract during the contract term, although not thereafter. Thus, addition of abandonment provisions to a bill already including the provisions of Section 4(d) would not have been necessary to make regulation more effective or meaningful if these abandonment provisions were not intended to be more comprehensive than the provisions of Section 4(d).

2. The Commission's long-standing and consistent interpretation that Section 7(b) approval is required to abandon service at the termination of a contract lends strong support to this position. Since the enactment of the Act in 1938, this interpretation has never been seriously questioned by the pipelines with respect to their own operations.

3. The Commission's policy that certificates of public convenience and necessity should normally be of indefinite duration does not, contrary to petitioner's insistence, result in the abrogation of contracts in the natural gas industry. As this case shows, the indefinite duration certificate will not affect the contractual obligation of either party any more than is necessarily implicit in the suspension powers of Section 4(e) which have been consistently recognized in the cases relied on by petitioner, including *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332. And the fact that petitioner cannot cease a service at the end of a contract term does not render the term provisions of the contract nugatory. This

Court's construction of comparable abandonment provisions of the Interstate Commerce Act also supports the Commission's view that the termination of a contract does not warrant abandonment absent agency approval, and that this is a necessary aspect of regulation.

C. Finally, petitioner is also in error in its contentions that the Commission's duty to assure continuity of service is limited by the provisions of Section 7(a), relating to compulsory extensions, and Section 1(b), defining the scope of jurisdictional transactions. Moreover, these contentions are clearly not ripe for judicial review.

1. Petitioner's reliance on the limitations upon the Commission's powers to compel extensions and make sales in Section 7(a) (App., *infra*, p. 66) is based on two premises that have no basis in fact. In the first place, the certificate cannot be said to require dedication of any quantities of gas in addition to those covered by its contract with United because it is not known whether United will take the full quantities it is contractually entitled to take. Secondly, Section 7(a) shows congressional realization of the importance of uninterrupted service to customers and confers authority upon the Commission to order a natural gas company to make certain extensions or improvement of its facilities and involuntary sales. That the provisions of Section 7(a) do not permit the Commission to compel the enlargement of transportation facilities does not support petitioner's broad claim that the Commission is thereby prohibited

from taking any action that might restrict managerial judgment as to the disposition of its gas.

2. Commission control over abandonment is also not limited by the "production or gathering" exception in Section 1(b) (App., *infra*, p. 62). Petitioner's contention in this respect should not, however, be considered at all by this Court since the objection to the order was not raised in its application to the Commission for rehearing. See Section 19(b) of the Act (App., *infra*, pp. 69–70). In fact, the objection has been raised for the first time in petitioner's brief on the merits in this Court.

Should the merits of this contention nevertheless be reached, this Court's decision in *Phillips Petroleum Company* v. *Wisconsin*, 347 U.S. 672, demonstrates the fallacy of petitioner's claim. Commission jurisdiction over the sales by petitioner to United is not questioned, and this Court in *Phillips* held that Congress intended effective regulation of jurisdictional sales. Since control over abandonment of service is necessary for effective regulation, abandonment jurisdiction must be as broad as jurisdiction over sales. Moreover, the Act was intended to plug the gap resulting from constitutional limitations on state regulation of the natural gas industry. Since the states do not, and cannot, regulate abandonment of interstate sales as such, Commission control of abandonment of services by a producer is necessary to prevent a regulatory void. The decision in *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, related to undeveloped reserves held for future use and is not to the contrary.

3. Petitioner's arguments based on both Section 1(b) and Section 7(a) are, basically, not objections to certification for unrestricted duration but assertions that the Commission has no jurisdiction to compel sales by preventing abandonment of service to United at the end of the contract term. By rendering service under a certificate of indefinite duration, petitioner will not be precluded from raising these objections in the event that abandonment authority is later sought in a Section 7(b) proceeding. Moreover, it is not the authorization of service under the certificate which may require petitioner to continue service beyond the contract term, but the provisions of Section 7(b). In these circumstances, the issues relating to the Commission authority to require sales twenty years from now are too hypothetical and conjectural to permit present review.

ARGUMENT

PETITIONER IS NOT ENTITLED TO A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY LIMITED TO THE DURATION OF ITS INITIAL SALES CONTRACT

Petitioner sought authorization from the Commission to render a service to United by selling gas to it pursuant to a contract, and also, in effect, an advance authorization to cease that service at the expiration of the contract. As the record amply reflects, petitioner did not establish that the issuance of a certificate thus limited in duration would serve the public interest. On the contrary, the grant of a limited certificate here would serve to further solely the private economic interest of this petitioner.

In these circumstances, the question comes down to whether, as petitioner insists, the Natural Gas Act requires the Commission to grant certificates on the time terms specified by the producer when the application is made, no matter how short that time limit may be. We submit that the answer is clearly in the negative.

Admittedly, the Commission is empowered to issue certificates under Section 7(e) which are limited in duration, if it finds that such a time limitation is required by the present or future public convenience and necessity as a condition for initiation of service. In a few exceptional circumstances, the Commission has done so. As we shall show, however, the Commission's general insistence that certificate authorizations be without time limitation has a sound foundation in the Act and its underlying policy. Section 7(b) specifically grants to the Commission the authority to control abandonment. That Section, like Section 7(e) under which petitioner applied for its certificate, was intended by Congress to implement effective rate regulation under Sections 4 and 5. Manifestly, the Commission could not properly exercise this control were it to grant a limited-term certificate merely because the applicant desired for personal business reasons to restrict its obligation to provide service to the duration of an existing contract.

We shall also show that neither the portions of the Act nor the decisions of this Court upon which petitioner relies call for the conclusion that the Commission was obliged to issue a certificate on petitioner's terms. In this connection, it should be stressed at once that

there is no warrant for petitioner's assumptions respecting the amount of gas which it will be required to furnish United by its election to provide service under the certificate. It cannot be ascertained at this juncture how much gas petitioner will have to sell during the term of the contract. More importantly, at the conclusion of the contract period, petitioner will be free to seek authorization under Section 7(b) to abandon service. It may be that, on the basis of then-prevailing conditions, the Commission would find that the public interest would be furthered by permitting petitioner to terminate its sales to United. At this time, of course, any determination by the Commission in this regard would be plainly premature.

A. IN ISSUING CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY PURSUANT TO SECTIONS 7 (c) AND (e) OF THE NATURAL GAS ACT, THE COMMISSION MUST CONSIDER THE LEGISLATIVE POLICY IN SECTION 7(b) GIVING IT CONTROL OVER THE ABANDONMENT OF JURISDICTIONAL SERVICES

Sections 7 (c) and (e) (App., *infra*, pp. 67–68) vest in the Commission the power and duty to control the terms and conditions under which natural gas companies may initiate proposed sales at wholesale ~~prices~~ or transport natural gas in interstate commerce—the services performed subject to Commission jurisdiction by natural gas companies.[3] It is quite true, as petitioner points out (Br. 15–16), that if a natural gas company does not find such terms and conditions acceptable to it, it is not compelled to initiate the

[3] Petitioner's suggestion (Br., pp. 12–14, 17, fn. 5) that a producer's sales of gas do not involve providing of a service is without merit. See *infra*, pp. 22*ff*.

proposed service. This is because there is no dedication to interstate commerce of its properties until gas commences to flow in interstate commerce. *Atlantic Refining Co.* v. *Public Service Commission of New York,* 360 U.S. 378, 387. But the fact that a natural gas company may refuse to serve except on the terms stated in its certificate application does not require the Commission to approve service on those terms whether or not the public convenience and necessity will be advanced. As the court below stated (R. 108), if petitioner were right, it would mean that a natural gas company could dictate the terms and conditions of every certificate, particularly the length of its commitment to serve. This, of course, would be inconsistent with the Commission's power to control initiation of service in order to make regulation more effective.

While the standard of public convenience and necessity is not capable of precise definition, the Commission must give the greatest possible effect to all the provisions of the Act, and their policies, in applying the standard. See, *e.g., Atlantic Refining Co.* v. *Public Service Commission of New York,* 360 U.S. 378; *United States* v. *Detroit Navigation Co.,* 326 U.S. 236, 241; *Central West Utility Co.* v. *Federal Power Commission,* 247 F. 2d 306 (C.A. 3); cf. *National Broadcasting Company* v. *United States,* 319 U.S. 190, 215–220. As the Commission and the court below recognized, one of these policies is reflected by Section 7(b) of the Act (App., *infra,* pp. 66–67). That Section, which requires a natural gas company to obtain Commission approval to abandon a jurisdictional service, expresses the congressional purpose

that a natural gas company should not be allowed to discontinue a service solely because of dissatisfaction with Commission regulation or the prospect of greater profits from a different utilization of its assets. The reasons petitioner has stated in justification of a limited-term certificate are clearly inconsistent with this statutory mandate.

1. *For the purpose of achieving more effective regulation, Sections 7 (c) and (e) give the Commission general control over initiation of service by natural gas companies.*—The present provisions of Sections 7 (c) and (e) were adopted in 1942. The addition of the certificate requirements contained in these Sections was intended to strengthen and make more effective the Commission's regulation of natural gas companies and their rates.

As originally enacted in 1938, the Natural Gas Act, 52 Stat. 821, subjected any company rendering a jurisdictional service to Commission regulation of rates and charges. In addition, once service had been initiated, jurisdictional facilities or services could be abandoned only with Commission approval pursuant to Section 7(b) of the Act. The power of the Commission to control initiation of service was, however, limited to situations in which a company sought to enter a market already being served by another natural gas company.* Since most of the expansion

* In determining whether a certificate of public convenience and necessity should be granted to enter a competitive market, the Commission was required to

"* * * give due consideration to the applicant's ability to render and maintain adequate service at rates lower than

during the period the 1938 provisions remained in effect was directed to development of new markets rather than to markets already served, this meant that, in most instances, the Commission had no control over the initiation of service by natural gas companies or over the expenditures incurred by those companies for the construction of facilities required to render those services. At the same time, those construction costs, even if unwarranted or uneconomic, would have to be considered by the Commission in determining the rate base in connection with its rate review powers under Sections 4 and 5 of the Act.[5]

In 1942, Congress amended the Act with the express intention of plugging this gap in the regulatory scheme. Section 7(c) was changed so as to require all persons to obtain certificates of public convenience and necessity authorizing them to engage in jurisdictional services or to construct, extend or acquire facilities the use of which would make them natural gas companies. Congress also added Section 7(e), which

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those prevailing in the territory to be served, it being the intention of Congress that natural gas shall be sold in interstate commerce * * * at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest." [52 Stat. 825.]

Thus, the original certificate provisions, as well as the abandonment provisions, *infra*, p. 24–32, were intended to provide gas to ultimate consumers at reasonable rates.

[5] Prior to the amendment of the Act in 1942, only 16 certificate applications were received by the Commission. The majority were dismissed for lack of jurisdiction and only 4 certificates were issued. See Federal Power Commission, *The First Five Years Under the Natural Gas Act* (1944), p. 3.

prescribes the standards to be applied by the Commission in deciding if a proposed act or service should be authorized.

The purpose of these amendments was explained by the House Committee on Interstate and Foreign Commerce in these terms [H. Rept. No. 1290, 77th Cong., 1st Sess., pp. 2–3]:

> * * * The bill when enacted will have the effect of giving the Commission an opportunity to scrutinize the financial set-up, the adequacy of gas reserves, the feasibility and adequacy of the proposed services, and characteristics of the rate structure in connection with the proposed construction or extension at a time when such vital matters can readily be modified as the public interest may demand. * * *

And the Senate Committee on Interstate Commerce made a similar explanation [S. Rept. No. 948, 77th Cong., 2d Sess., pp. 1–2]:

> Provisions of the Natural Gas Act empower the Commission to prevent uneconomic extensions and waste, but it can so regulate such powers only when the extension is to "a market in which natural gas is already being served by another natural-gas company." Thus the possibilities of waste, uneconomic and uncontrolled extensions are multiple and tremendous. The present bill would correct this glaring inadequacy of the act. It would also authorize the Commission to examine costs, finances, necessity, feasibility, and adequacy of proposed services. The characteristics of their rate structure could be studied. * * *

See also Hearings Before the House Committee on Interstate and Foreign Commerce on H.R. 5249, 77th Cong., 1st Sess., pp. 5–6.

The language of Section 7(e) is fully consistent with this expression of a legislative purpose to give the Commission more complete regulatory power over natural gas companies and prospective companies. More specifically, there is nothing in the Section to suggest that a natural gas company may dictate the terms upon which the certificate is issued. The Section provides:

> Except in the cases governed by the provisos contained in subsection (e) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

Thus, the Commission must find that any "proposed service, sale, operation * * * is or will be required by the present or future public convenience and necessity" before it may authorize the initiation of a service. It must also find that any terms and conditions which it attaches to the issuance of a certificate are required by the public convenience and necessity.

Contrary to petitioner's assertion, the Commission's authority to issue a certificate unlimited in duration—where it believes the public interest so requires—is not restricted by the provision that the certificate shall authorize "the whole or any part of the operation, sale, service, * * * covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed * * *." Underlying petitioner's reliance on these provisions is the premise that its application for a certificate did not seek authorization to render a service, but merely authority to sell gas for a limited period. Where, however, an applicant seeks authority to sell gas at wholesale prices in interstate commerce, this request necessarily encompasses permission to perform a service as well. Indeed, this is clear from the very statutory language to which petitioner points: before a certificate is issued, the applicant must be willing "to perform the service proposed." Since a certificate under Section 7(c) is required before a sale at a wholesale price is made in interstate commerce, whether or not transportation is involved (see *Phillips Petroleum Co.* v. *Wisconsin*, 347

U.S. 672), the sale and delivery of gas, as well as its transportation, must constitute a "service" within the meaning of Section 7(e).[*] See the discussion in our brief in No. 321, *Sun Oil Co.* v. *Federal Power Commission*, at pp. 15–18.

Merely because a certificate is unlimited in duration does not mean that it will require the performance of a *service* broader than that requested. In this case, the Commission has authorized petitioner to sell all the gas covered by its contract and to render the service which is involved in making those sales. Petitioner is clearly able and willing to make the sales and render the service proposed and the Commission so found (R. 84). As that term is used in Section 7(e)—when read together with Section 7(b) and other provisions of the Act—the "service" is the continuous furnishing of the gas to the purchaser. What petitioner is really complaining about is the refusal of the Commission to agree now to the termination of that service proposed by petitioner, at a specified future date—*i.e.* the refusal of the Commission to attach certain terms and conditions to the service. We stress again that under Section 7(e) the Commission could have attached those conditions only if the petitioner had demonstrated, which it did not, that they

[*] Section 4(c) requires the same conclusion. That Section provides that for the filing of "schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, * * * together with all contracts which in any manner affect or relate to such rates, charges, classifications and services." The only possible antecedent for "services" is "any transportation or sale subject to the jurisdiction of the Commission."

were required by the public convenience and necessity.[7]

2. *Commission action under Section 7(e) must consider the complementary policies of the abandonment provision of Section 7(b).*—Petitioner's argument that the Act foreclosed the Commission from issuing it an unlimited-term certificate is refuted by Section 7(b), upon which both the Commission and the court below relied.[8] This Section provides:

> No natural-gas company shall abandon all or any portion of its facilities subject to the jur-

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[7] Even accepting petitioner's theory that the application sought authority solely for certain precise sales of gas, it could not be said that the unlimited certificate was precluded by Section 7(e). Petitioner assumes that the contract calls for the delivery to United of a fixed and presently ascertainable quantity of gas, and that the unlimited certificate will require it to exceed that quantity. As we show below, pp. 50ff, both of these assumptions are in error.

[8] In contending that the Natural Gas Act gives the Commission no responsibility to assure continuity of service, petitioner maintains (Br. pp. 18–20) that the court below, in stating that "[n]o single factor in the Commission's duty to protect the public can be more important to the public than the continuity of service furnished" (R. 108), relied only on Section 7(a) of the Act. Even a cursory examination of the opinion below shows that the Tenth Circuit's statement was based, not on Section 7(a) alone, but on the specific powers granted by Section 7(b), and the court's realization that effective regulation in the sphere entrusted to the Commission would be impossible if natural gas companies could cease service as they pleased. In this connection, it pointed out that the powers granted in Section 7(a) would be useless if natural gas companies could specify the date on which they would terminate their service.

Nevertheless, it is pertinent to note that Section 7(a) does indicate a congressional awareness of the need for uninter-

> isdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

The purpose and policy of Section 7(b) are infused into the certificate provisions of Section 7(e), which are directly involved in this case, so as to guide and direct the Commission in granting or denying certificates of convenience and necessity.

a. Section 7(b) is a necessary concomitant to the Commission's regulation of the rates for jurisdictional sales and transportation of natural gas, for if a natural gas company could abandon these services at will, rate regulation would be subject to coercion by the regulated companies threatening to cease services upon which the public has become dependent. This would be true whether or not the abandonment would result in the immediate cessation of service to any ultimate consumer. Even if a substitute supply of gas might be obtained without the curtailment of any service to ultimate consumers, it would usually be

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rupted and unimpaired service to existing users of natural gas." For the Commission's authority to order a natural gas company involuntarily to establish physical connection with a distributor or sell gas to such distributor is limited to situations in which this would not "impair [the natural gas company's] ability to render adequate service to its customers." Section 7(a), *infra*, p. 66.

obtained only at higher cost to the pipeline—certainly at least to the extent that the construction of new facilities by the pipeline to replace service from undepleted reserves would result in an increased rate base for the pipeline—which would be reflected in higher rates for the ultimate consumer. The Third Circuit, in *J. M. Huber Corp.* v. *Federal Power Commission*, 236 F. 2d 550, certiorari denied, 352 U.S. 971, aptly described the very serious consequences of permitting independent producers to abandon their services at will (236 F. 2d at 558):

> We think the sense of the Phillips decision [347 U.S. 672] is altogether opposed to permitting the Commission's control of sales to be nullified by the independent producer's abandonment of those sales at will. The money losses to distribution lines and to the ultimate consumers would be stupendous in actual equipment, etc., but a far greater loss would be the deprivation of the vital gas itself to the public. Eventually some sort of substituted service might be brought in at further cost and it in turn, because of opportunity for greater profit or the whim of the producer, might later abandon its sales. The resultant conditions need not be labored. The Commission under Section 1(a) above quoted has no greater duty than to prevent them.

Such a result would be hardly consistent with the primary aim of the Act which was "to protect consumers against exploitation at the hands of natural gas companies." *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 610. As this Court

recently held, the Commission must consider this "overriding intent" in certificate proceedings as well as in its actual review of rates. *Atlantic Refining Co. v. Public Service Commission of New York*, 360 U.S. 378.

It may be that in particular cases the proposed abandonment of a service by an independent producer will, in fact, have no direct impact on its pipeline purchaser's ability to continue to deliver gas to its customers or materially affect its rate base. However, the effect of a discontinuance of service by an independent producer will depend on the facts in each case with respect to the pipeline's other sources of supply. The situation in this regard must be ascertained at the time of the proposed abandonment and cannot be predicted years in advance. Indeed, if the Commission were required to grant petitioner a limited-term certificate, the Commission would presumably be required to issue limited-term certificates to every producer making such a request. Petitioner states that, as of July 1959, about 84 per cent of the producer contracts were for the length of 20 years or more (Br. p. 28, fn. 14). Thus, it would follow from acceptance of petitioner's position that most producer certificates would have to permit abandonment of services, without Commission approval, contemporaneously with the proposed abandonment date. And, presumably, future contracts would be made by producers for periods much shorter than 20 years.

Since pipelines enter into purchase contracts for similar durations with many producers during the

same period, the result of limited-term certificates would mean that not one, but numerous, sources of supply might become unavailable to a pipeline within a short period of time. For example, in *Atlantic Refining Co.* v. *Public Service Commission of New York,* 360 U.S. 378, the four producer contracts upon which a proposed pipeline project were based each had a primary term of twenty years and were thereafter terminable upon six months notice by either party. See Nos. 518, 536, Oct. Term 1958, Record pp. i, 316. Similarly, in *Public Service Commission of New York* v. *Federal Power Commission,* 361 U.S. 195, twenty-two of the producer contracts underlying the producer rates had primary terms of twenty years, while sixteen had primary terms of twenty-two years. See Nos. 459, 473, Oct. Term 1959, Record pp. 302–303. The direct impact on the continuity of service and rates to consumers if all producers whose contracts expired at one time decided to withdraw from making jurisdictional sales at about the same time is apparent.

The danger to the gas-consuming public from an indiscriminate and across-the-board restriction of the Commission's control over abandonment is emphasized by petitioner's contentions (Br. 44–51) that producers should be permitted to reassess the desirability of gas sales compared to oil sales on a periodic basis. It is apparent that what petitioner is seeking is the untrammeled right to determine whether to continue selling gas from developed reserves without regard for the needs of the ultimate consumer.

As this Court recognized in *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division*, 358 U.S. 103, the Commission, in applying the regulatory scheme of the statute, necessarily takes into consideration the legitimate interests of natural gas companies, as well as those of the ultimate consumers. But while the business interests of natural gas companies may be relevant in ascertaining the public interest, it is only one of many factors to be considered. And whatever weight the Commission may ascribe to that interest when a natural gas company seeks to abandon a service, the Commission should not be required to speculate as to the facts that may exist twenty years or more in the future, or be required to issue a limited-term certificate which might result in injury to the public from curtailment of service[9] or

[9] Petitioner argues (Br. pp. 26–28) that Commission practice with respect to the extent of gas supplies that a pipeline must prove to obtain a new certificate for new service shows that certificates of unlimited duration for producer sales are not required. While a pipeline's gas reserves at the time of certification may assure service for only twenty years or less, the fact that the Commission authorizes the initiation of service does not suggest that service only for a limited period is anticipated or that a certificate would be issued for short-term service (indeed, the certificates are, except in rare instances, of indefinite duration). To the contrary, the Commission accepts such proof as sufficient because the pipelines have over the years demonstrated their ability to seek and add new reserves to support services already initiated, as well as to warrant expansion. However, the fact that the ultimate duration of a pipeline's service is not ascertainable at the inception of service, in view of the uncertainty of this country's gas reserves, does not require the infusion of more uncertainty by issuance of certificates to producers coextensive with their present gas sales contracts.

in the allowance of higher rates to forestall such curtailment.

b. The legislative history of Section 7(b) shows clearly that it was intended to complement and strengthen the Commission's power to regulate rates. Commission control over abandonment was proposed by John E. Benton, Solicitor of the National Association of Railroad and Utilities Commissioners, during the House hearing on H.R. 11662, 74th Cong., 2d Sess., which contained no abandonment provision. In the course of his testimony, he told the committee (Hearing before a Subcommittee of the House Committee on Interstate and Foreign Commerce on H.R. 11662, 74th Cong., 2d Sess., at p. 92):

> There should not be any possibility of a company having the chance to claim, and to litigate the claim, that if it does not like a rate which has been fixed by the Federal tribunal, it can discontinue service. If a company has established service to a distributing company, on which the public are dependent, and a rate is fixed by the Federal tribunal for that service which the company does not like, the company should not be in a position to say, "We are permitted to abandon our service, and we will abandon it." [10]

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[10] Later in his testimony, Mr. Benton suggested that the following language be added as paragraph (b) of Section 7:

"(b) No gas company, which is supplying gas to a public utility company, engaged in distributing such gas to the public, shall discontinue service to such public utility company without first obtaining from the Commission a certificate that public convenience and necessity permit such abandonment." [*Id.* at 98.]

He also stated that the "language is largely taken from the abandonment provision of the Interstate Commerce Act."

Evidently on the strength of this suggestion, a later substitute bill (H.R. 12680, 74th Cong., 2d Sess.) contained a provision identical to Section 7(b) as enacted by the 75th Congress in 1938. The "production or gathering" exception in Section 1(b), upon which petitioner relies to limit the scope of Section 7(b), also appears in H.R. 12680, so that the authors of the bill obviously did not deem the provisions inconsistent.

H.R. 12680 was reintroduced in the 75th Congress as H.R. 4008, with the same abandonment provisions. During hearings on this bill, a representative of several natural gas companies proposed an amendment to Section 7(b) which would have permitted abandonment of facilities if service was not impaired, stating that the "intent, we felt, [of Section 7(b)] was that the consent of the Commission on abandonment should be obtained only where some effect on service would result * * *." Hearing before House Committee on Interstate and Foreign Commerce on H.R. 4008, 75th Cong., 1st Sess., p. 127.[11] The Chairman of the New York Public Service Commission similarly criticized Section 7(b) as too broad, but wrote the committee that "[t]he important thing is that service shall not be abandoned without approval of the commission having jurisdiction * * *." *Id.* at 148.

This legislative history of the abandonment provision, though not extensive, demonstrates clearly that Section 7(b) was adopted to prevent natural gas com-

[11] This modification was not incorporated into the bill as finally enacted.

panies from withdrawing from rendering jurisdictional services because of dissatisfaction with regulation and the prospect that greater profits could be obtained through a different utilization of its gas.

3. *Petitioner has failed to demonstrate that abandonment of its service at the termination of its sales contract is permitted or required by the public interest.*—In issuing certificates of public convenience and necessity under Section 7 (c) and (e) authorizing the initiation of a service, the Commission normally grants certificates without any time limitation in order to retain its complementary authority over cessation of service under Section 7(b) so that it may implement the purposes of that Section. For, as has been shown, *supra*, p. 27, prior to the initiation of a producer's service, the Commission is normally not able to make any realistic appraisal of the life of the gas reserves or whether the pipeline purchaser will need a particular supply of gas to assure uninterrupted service to its customers at the expiration of a ten, fifteen, or twenty-year contract. The cases in which final certificates of limited duration have been issued by the Commission help delineate the type of showing that must be made to permit or require such a deviation.

In some instances, for example, limited-term certificates were required by the public convenience and necessity because the gas proposed to be sold had previously been committed to other services and was, therefore, only temporarily available. See, *e.g.*, *Southern Natural Gas Co.*, 8 F.P.C. 688; *Oklahoma Natural Gas Co.*, 20 F.P.C. 12; *Arkansas Louisiana Gas Co.*,

20 F.P.C. 517. In at least two instances, the operation of facilities by an applicant were certified for a limited period because it was known that those facilities were required to be conveyed thereafter. *Austin Field Pipe Line Co.*, 6 F.P.C. 1011; *Central Kentucky Natural Gas Co.*, 7 F.P.C. 440. It is to be noted, however, that in both cases the physical service was to be continued by the new operator after the transfer of facilities so that no abandonment of service to ultimate consumers was involved.

In *Ohio Fuel Gas Co.*, 3 F.P.C. 301; *Tennessee Gas and Transmission Co.*, 4 F.P.C. 293; and *United Gas Pipe Line Co.*, 4 F.P.C. 307, the Commission found that the services proposed were required during the war emergency to prevent shortages to existing customers. But the needs for the post-war period were unclear, so that limited-term certificates were issued by which the Commission retained authority to determine, at a later date, the best utilization of the gas supplies involved.[12] Cf. *Gateway Transportation Co. v. United States*, 173 F. Supp. 822 (W.D. Wisc.). Had the Commission issued unlimited-term certificates, it would not have been able to control post-war utilization of the gas. This is because the Commission would presumably not have been able to change

[12] Similarly, in *Kansas-Nebraska Natural Gas Co.*, 3 F.P.C. 841; and *Northern Natural Gas Co.*, 3 F.P.C. 939; 4 F.P.C. 414, 415, emergency war conditions warranted the issuance of temporary certificates for the duration of the emergency. In each case, the institution of emergency natural gas service was found to be required urgently in the furtherance of the national defense effort. The cessation of need for this gas was clearly foreseeable.

the certificates. Cf. *United States* v. *Seatrain Lines, Inc.*, 329 U.S. 424.[13]

In each of these cases, there was an ample basis for the issuance under Section 7(e) of certificates of limited duration. Comparable considerations of public interest have not been shown to exist in this case. On the record, the only justification given by petitioner for a limited-term certificate is that, after expiration of the present contract with United, continued sales to United might prove to be uneconomical (R. 15–19). In essence, petitioner's position below was that, because it might be dissatisfied with Commission regulation, it should be free to withdraw its gas from the interstate market at the expiration of the contract regardless of the public need at that time. While a natural gas company is generally bound by the obligations of a contract during the term agreed to by the parties (see *infra*, pp. 38, 42–43, 45–46), it may

[13] Petitioner's statement (Br. pp. 37, 51) that the Commission has "approved for filing tariffs and forms of service agreements, which provide, in so many words, that the pipeline will not be obligated to sell gas to a customer with whom the pipeline does not have an executed service agreement" is confusing. While the services are to be rendered pursuant to a particular type of executed agreement, service under these agreements, once initiated, is subject to Commission regulation, including the abandonment provisions of Section 7(b) and the notice-of-change provision of Section 4(d). As we discuss in more detail in our brief in No. 321, this Term, these statutory provisions, as well as the implementing regulations, effectively extend the life of a service-agreement beyond its term until there has been compliance with the notice-of-change provisions of Section 4(d) of the Act, and also with the abandonment provision if a different service-agreement is not to be substituted.

thereafter, if required to continue the service by the Commission, unilaterally file changes in the rates and terms of its service under the provision of Section 4(d) of the Act. See *infra*, p. 43.[14]

In its brief here (pp. 44–51), petitioner for the first time in these proceedings makes the claim that, because of the interrelation between the oil and gas industries, gas producers should be permitted periodically to redetermine whether their private interest requires them to curtail their gas sales in order to increase their oil profits. It is clear, of course, that this argument, whatever its merits, should have been addressed first to the Commission and, since it was not, should not be considered by this Court. See the discussion in the Commission's brief in *Federal Power Commission* v. *Shell Oil Co.*, No. 170, this Term, at pp. 16 *et. seq.* Nevertheless, it is pertinent to point out that petitioner is basically contending that the gas producers should be free to curtail their gas production in order to raise oil prices, even if the result would be to imperil the existence of the pipelines and service to the gas-consuming public. This assertion itself emphasizes the need for Commission regulation of the abandonment of gas services, for the Commission can protect the public and also consider the economic needs of the producers on the basis of the facts existing when abandonment is sought. By indiscriminately granting certificates coextensive with the particular sales contracts of the producers, the

[14] Of course, the Commission would approve changes only if they were shown to be just and reasonable. Section 4(e), App., *infra*, pp. 64–65.

Commission would fail to protect the ultimate consumers, the principal beneficiaries of regulation under the Natural Gas Act.

B. COMMISSION CONTROL OVER ABANDONMENT OF SERVICE IS NOT LIMITED BY THE TERMS OF PRIVATE CONTRACTS

It is clear, we believe, that Congress intended the abandonment provisions of Section 7(b) to apply without regard to the existence of a contractual obligation to serve. As petitioner points out (Br. pp. 32–33), Congress was fully apprised during consideration of possible natural gas legislation that virtually all relations in the gas industry had long been founded on contracts and that service in the absence of contract was the exception. Moreover, as petitioner also notes (Br. pp. 34, 35), the Act contemplated that relations in the gas industry would continue to be initiated by private contracts. Nevertheless, Congress has centered control over abandonment in the Commission.

1. *The legislative context of Section 7(b) requires its application regardless of the termination of a contract.*—If, as petitioner insists, Section 7(b) were intended to have application solely during the term of a service contract, there would have been no occasion for its addition to the statute as an implementation of the Commission's rate regulation authority. To the contrary, the Section has meaning only if its reach extends to abandonment of service following the termination of the contract.

At the time that the insertion of an abandonment provision in the Natural Gas Act was first proposed,

the bill then under consideration already had a provision identical to Section 4(d) of the Act. See Hearing before a Subcommittee of the House Committee on Interstate and Foreign Commerce on H.R. 11662, 74th Cong., 2d Sess., p. 2. That Section provides that "no change shall be made by any natural-gas company in any * * * service * * * or contract relating thereto" except after thirty days' notice to the Commission.

It is clear that the cessation or abandonment of service would constitute a change for which notice would have to be given under Section 4(d). See, *e.g.*, *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 343 U.S. 414;[15] *Jersey Central*

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[15] In that case, the Court in construing the almost identical provisions of Section 205(d) of the Federal Power Act, 16 U.S.C. 824d, stated (343 U.S. at 423-424):

"If Penn Water wishes to discontinue some or all of the services it has rendered for the past twenty years, the Act, as the Commission pointed out, opens up a way provided Penn Water can prove that its wishes are consistent with the public interest. Shorty after Part II of the Power Act was passed in 1935, Penn Water, as required by § 205(c), filed with the Commission the contract here attacked and then designated by the Commission as 'Penn Water's Federal Power Commission Rate Schedule No. 1.' Section 205(d) provides that 'no change shall be made by any public utility in any such * * * service * * * or contract relating thereto, except after thirty days' notice to the Commission and to the public.' Here instead of following the procedure for changing existing services and practices—a procedure which the Congress has authorized and which the Commission has supplemented by rules of its own—the company has rather tried to utilize a violation of the Sherman Act so as to nullify a rate-reduction order."

See also the Commission's brief in *Sun Oil Company*, No. 321, this Term, at pp. 25-33.

Power & Light Company, 3 F.P.C. 1036. But, as this Court held in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, Congress did not intend the notice-and-filing procedure of that Section to be available to a natural gas company if the change was precluded by contract. Thus, had the abandonment provisions of Section 7(b) not been inserted, a unilateral termination of service during the term of the contract still would not have been sanctioned by the Act. In other words, Section 7(b) was not necessary to prevent natural gas companies, while the contract was in effect, from discontinuing service because of dissatisfaction with rate regulation.

Section 7(b) is necessary, however, to give the Commission effective control, after the contract term has expired, over the discontinuance of service upon which the consuming public remains dependent. Upon such expiration, there is no longer a contractual impediment to the filing of a notice under Section 4(d) that service is to be terminated. *United Gas Pipe Line Co.* v. *Memphis Gas, Light and Water Division*, 358 U.S. 103. In the absence of Section 7(b), the Commission could suspend the termination for five months. But it could require continuation of service after that period only if it affirmatively found that the termination of the service would be unlawful. See Section 4(e). Section 7(b), on the other hand, enables the Commission to require continuation of service unless and until there is a positive showing by the applicant "that the available supply of natural gas is depleted to the extent that continuance of service is unwar-

ranted, or that the present or future public convenience or necessity permit such abandonment."

2. *The Commission's consistent view that Section 7(b) applies regardless of the expiration of a contract is entitled to great weight.*—Strong support for the position that Section 7(b) approval is required to abandon service at the termination of a contract is given by the consistent Commission interpretation of Section 7(b) to the effect that the expiration or termination of a contract to serve does not constitute a ground justifying the abandonment of either jurisdictional facilities or the services rendered thereby. This interpretation is entitled to great weight. See *United States* v. *American Trucking Associations, Inc.*, 310 U.S. 534, 539; *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 324–325.

The Commission first had occasion to pass upon the question in *United Gas Pipe Line Co.*, 3 F.P.C. 3, decided in 1942. In that case, United and its predecessor had served a distributing company, not subject to Commission jurisdiction, under a written agreement entered into in 1928. Pursuant to that agreement, the distributing company notified United that the contract would expire in November 1941 and that thereafter its requirements would be supplied from another source. Accordingly, United sought permission to abandon the facilities for this service or, in the alternative, a finding that abandonment permission was not required. In the hearing before the Commission, it was shown that,

despite the contract cancellation, the continuance of service was required for a period after November 1941 since the new gas supply would not be available until a later date. The Commission, in denying the abandonment application, said:

> * * * the expiration or termination of a contract does not constitute grounds justifying abandonment of facilities, nor would United be justified in assuming that, in the face of the mandatory provisions of Section 7(b) of the Act, either (a) the *facilities*, or (b) the *service* rendered by means of such facilities could be abandoned in the absence of approval of the Commission, after a hearing or hearings, and the production of requisite evidence justifying the finding or findings prescribed by the said section. *Seaboard Air Line Railway Receivers' Proposed Abandonment*, 202 I.C.C. 543, 553. [3 F.P.C. at 9; emphasis in original.]

The Commission added that the requirement that United continue its service did not depend on whether there was a new contract for service. Particular importance attaches to this interpretation of the scope of Section 7(b) since it represents the view of the same Commissioners who had participated in the proceedings leading to adoption of the Natural Gas Act.[16] See *United States* v. *American Trucking Assn., supra; Norwegian Nitrogen Products* v. *United States, supra.*

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[16] Commissioners Manly, Draper, Scott and Seavey, who signed the opinion in the *United* case, had all been appointed to the Federal Power Commission by 1937.

Similarly, on two occasions, the Commission has refused to permit a natural gas company which both produced and transported gas to abandon its service to customers being served under expired contracts, on the ground that the proposed abandonment would have left natural gas users without substitute supplies or an opportunity to convert to other fuels prior to the proposed abandonment. *Cabot Gas Corp. and Godfrey L. Cabot, Inc.*, 3 F.P.C. 357 and 582. On both occasions, the Commission also held that the natural gas company could not give preferential service to one of its customers for the sole reason that it was serving that customer under a contract while the service to its other customers was being continued after the terms fixed by their contracts had expired.[17]

The Commission reiterated its view that the termination of a service-agreement does not control the question of whether the abandonment of service will be permitted by the public convenience and necessity in *Panhandle Eastern Pipe Line Co.*, 11 F.P.C. 167, 172, vacated for reconsideration on other grounds, *sub nom. Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 204 F. 2d 925 (C.A. 3). It should be noted, however, that Panhandle had made no serious contention that the termination of its contract to sell gas to Michigan Consolidated Gas Company permitted it to abandon or curtail its long-standing serv-

[17] In *Consolidated Gas Utilities Corp.*, 3 F.P.C. 927, the Commission, in authorizing the abandonment of a service for which contractual obligations had terminated, based its decision principally on the fact that a different user had greater need for the supply of gas involved.

ice without Commission approval. Indeed, the Commission's construction of Section 7(b) in the *United* and *Cabot* cases has never been seriously questioned by the pipeline companies.

3. ***Recognition of private contracts in the Natural Gas Act does not remove those contracts from Commission regulation under Section 7(b).***—The Commission's view that certificates of public convenience and necessity issued under Section 7 (c) and (e) should be of indefinite duration, in the absence of special considerations not demonstrated by petitioner to be present here, is predicated on its conviction that the congressional purpose "to create a comprehensive and effective regulatory scheme" (*Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U.S. 507, 520; *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378, 392) can be achieved only by applying the policy embodied in Section 7(b) to the fullest extent possible.[18]

a. Contrary to petitioner's insistence, this policy of the Commission does not result in the abrogation of contracts in the natural gas industry. In this case, the unlimited duration certificate will have no effect upon the performance of any of the contractual obligations of either petitioner or United during the term of the contract. The only effect of the indefinite

[18] In the light of the Commission's expressed reliance on Section 7(b) (R. 103), we do not understand the purpose of petitioner's statement (Br. pp. 28–29) that the Commission's belief that certificates should normally be of indefinite duration "apparently is predicated on the assumption that the Natural Gas Act, in common with other regulatory statutes, embodies broad regulatory concepts."

term of the certificate is that petitioner will not be able automatically to cease service when its obligations under the contract have expired.

This possible imposition of a subsequent non-contractual obligation does not, as petitioner asserts, negate the term provision of the contract. Typically, as in this case, producer-pipeline contracts establish rates for the entire contract term.[19] In *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, the Court held that a natural gas company cannot file a changed rate in derogation of its contract. And in the absence of a finding under Section 5(a) of the Act, *infra*, pp. 65–66, that a contract rate is "so low as to adversely affect the public interest," the Commission has no power to modify the contract rate, even if the producer made a bad bargain. *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348, 355. Accordingly, during the term of a contract, the price fixed by the parties determines the maximum cost of gas to the pipeline purchaser. After the contract term expires, however, the producer is free to file changed rates pursuant to Section 4(d) of the Act at will, since there is no longer any contractual inhibition. *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 358 U.S. 103. In determining the proper rate under Section 4, the Commission then considers the needs and economic situation of the producer and the pipeline at that time, as well as the interests of the ultimate consumers. As the Court said in *Memphis* (at p. 113), Congress in this Act "was not only expressing its conviction that the public interest requires the protection of consumers from excessive prices for natural gas, but was also manifesting its concern for the legitimate interests of natural gas companies in whose financial stability the gas-consuming public has a vital stake. Business reality demands that natural gas companies

[19] The contract between petitioner and United here permits an increase of 1 cent per Mcf of gas every five years and also provides for price adjustments in accordance with a specified formula based on changes in the cost of living (R. 41).

should not be precluded by law from increasing the prices of their product whenever that is the economically necessary means of keeping the intake and outgo of their revenues in proper balance; * * *". See also *id.*, p. 114.

b. Even if the issuance of the unlimited term certificate were to be deemed a modification of the contract, petitioner's position would not be advanced. This Court and the courts of appeals have long recognized that the Natural Gas Act subjects contract rights to regulation. Thus, in *Atlantic Refining Co. v. Public Service Commission of New York*, *supra*, the Court held that the Commission may—and indeed should—issue a certificate subject to a price condition if it is not convinced that the public convenience and necessity require granting of an unconditional certificate. It was explained (360 U.S. 391–392):

> This is not an encroachment upon the initial rate-making privileges allowed natural gas companies under the Act. *United Gas Pipe Line Co. v. Mobile Gas Corp.*, *supra*, but merely the exercise of that duty imposed on the Commission to protect the public interest in determining whether the issuance of the certificate is required by the public convenience and necessity, which is the Act's standard in § 7 applications. In granting such conditional certificates, the Commission does not determine initial prices nor does it overturn those agreed upon by the parties. Rather, it so conditions the certificate that the consuming public may be protected while the justness and reasonableness of the price fixed by the parties is being determined under other sections of the Act. Section 7 procedures in such situations thus act to hold the line awaiting adjudication of a just and reasonable rate. * * *

And in a number of cases it had been determined that the Commission may suspend a changed rate, even though that rate had been mutually agreed to by the

contracting parties. See, *e.g.*, *Bel Oil Corp.* v. *Federal Power Commission*, 255 F. 2d 548 (C.A. 5), certiorari denied, 358 U.S. 804; *Cities Service Gas Producing Co.* v. *Federal Power Commission*, 233 F. 2d 726 (C.A. 10), certiorari denied, 352 U.S. 911; *Mississippi River Fuel Corp.* v. *Federal Power Commission*, 121 F. 2d 159 (C.A. 8); cf. *Mississippi Power & Light Co.* v. *Memphis Natural Gas Co.*, 162 F. 2d 388 (C.A. 5), certiorari denied, 332 U.S. 770.

United Gas Pipe Line Co. v. *Mobile Gas Service Corp.*, *supra*, is not to the contrary. There, a pipeline had contracted to sell gas for a fixed term at a fixed rate. During the term of the contract, the pipeline unilaterally filed a changed rate under Section 4(d) of the Act. This Court held that the Commission had no power to accept such a changed rate because, under Section 4(d), a natural gas company could only file contractually—permitted changes. The Court found that Section 4(d), in requiring notice of changes, imposed a prohibition on natural gas companies and did not grant them a power to act in abrogation of their contract obligations. It was emphasized that the Natural Gas Act, unlike the Interstate Commerce Act, contemplates the establishment of rates by individual contracts. And it was pointed out that the conclusion that the Natural Gas Act did not empower natural gas companies *unilaterally* to change their contracts supported the purposes of the Act by insuring a continuity of supply at a relatively stable rate (350 U.S. at 344):

> * * * By preserving the integrity of contracts, it permits the stability of supply arrangements

> which all agree is essential to the health of the natural gas industry. Conversion by consumers, particularly industrial users, to the use of natural gas may frequently require substantial investments which the consumer would be unwilling to make without long-term commitments from the distributor, and the distributor can hardly make such commitments if its supply contracts are subject to unilateral change by the natural gas company whenever its interests so dictate. * * * On the other hand, denying to natural gas companies the power unilaterally to change their contracts in no way impairs the regulatory powers of the Commission, for the contracts remain fully subject to the paramount power of the Commission to modify them when necessary in the public interest. The Act thus affords a reasonable accommodation between the conflicting interests of contract stability on the one hand and public regulation on the other.

Thus, the decision in *Mobile* was not that private contracts, pursuant to which relations in the natural gas industry were normally performed, are not subject to regulation. Rather, the Court held only that, to achieve the purposes of the Act, it was not necessary to permit natural gas companies *unilaterally* to abrogate the terms of their contracts through use of the filing and change provisions of Section 4. See also the discussion of the *Mobile* case in the Commission's brief in *Sun Oil*, No. 321, at pp. 33–38.

c. This Court's construction in *Thompson, Trustee* v. *Texas Mexican Ry. Co.*, 328 U.S. 134, of the comparable abandonment provisions of Section 1(18) of

the Interstate Commerce Act, 41 Stat. 477, as amended, 49 U.S.C. 1(18),[20] upon which Section 7(b) of the Natural Gas Act was based, lends further weight to the view that the termination of a contract does not warrant abandonment in the absence of Commission approval, and that such approval is a necessary aspect of regulation. In that case, two railroads had entered into a written contract by which, for payment of specified rentals, one railroad was granted the right to operate its trains over the tracks of the other for a term of fifty years, unless sooner terminated. Either party could terminate the contract on twelve months' notice. After the lessee railroad petitioned for reorganization under the Bankruptcy Act, the lessor gave notice that it was terminating the contract. The trustee in reor-

[20] Section 1(18) provides in pertinent part:

"No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 of this title shall be considered to prohibit the making of contracts between carriers by railroad subject to this chapter, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks."

ganization continued to operate trains after the purported termination date and refused to pay more than the rental specified in the contract. Suit was then instituted by the lessor to enjoin use of the tracks by the trustee and for money damages for use of the tracks after termination of the contract. The trial court denied an injunction but found that the contract had been terminated and awarded damages. This Court reversed, holding that the state court should have stayed its hand and remitted the parties to the Interstate Commerce Commission for the determination of several administrative questions. One of these related to the Commission's power over trackage agreements, the Court noting (328 U.S. at 144-145):

> By § 1(18) of the Interstate Commerce Act it is provided that "no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment." * * * Whatever may be the powers of the Commission under the Interstate Commerce Act, rather than § 77, over the terms of the trackage agreement (*Abandonment of Chicago, R.I. & P.R. Co.*, 131 I.C.C. 421; *Kansas City Southern R. Co.* v. *Kansas City Terminal R. Co.*, 211 I.C.C. 291), it is clear that the Commission has jurisdiction over the operations. * * * See *Chicago & Alton R. Co.* v. *Toledo, P. & W.R. Co.*, 146 I.C.C. 171, 179–181. And the

> fact that the trackage contract was entered into in 1904 prior to the passage of the Act is immaterial; the provisions of the Act, including § 1(18), are applicable to contracts made before as well as after its enactment. See *Louisville & Nashville R. Co.* v. *Mottley*, 219 U.S. 467, 482. Though the contract were terminated pursuant to its terms, a certificate would still be required under § 1(18). Brownsville or its trustee could, of course, make the application for abandonment of operations. * * *

See, also, *Smith* v. *Hoboken Railroad, Warehouse and Steamship Connecting Co.*, 328 U.S. 123.

The weight to be given to the *Texas Mexican* case is in no way limited by the *Mobile* decision. We recognize of course that, in *Mobile*, this Court did not consider precedents under the comparable rate provisions of the Interstate Commerce Act, upon which Sections 4 and 5 of the Natural Gas Act were based, as pertinent since private rate contracts are not permitted by the former Act. However, the discussion in *Mobile*, contrasting the transactions under the two Acts (350 U.S. at 338–339), was directed only to rate contracts as such. This was necessarily so since the Interstate Commerce Act expressly recognizes that many arrangements relating to service are based on contract in the railroad industry, a fact illustrated by the *Texas Mexican* case itself. This Court's view in that case, that regulatory control over the abandonment of operation of services is not to be hamstrung by private contracts, is equally pertinent to the continuity of service in the natural gas industry.

C. THE APPLICABILITY OF SECTION 7(b) TO JURISDICTIONAL SERVICES IS NOT LIMITED BY THE PROVISIONS OF SECTION 7(a) OR SECTION 1(b).

Petitioner urges that, even if the Act imposes a duty upon the Commission to assure continuity of service, that duty would be limited by the provisions of Section 7(a) (App., *infra*, p. 66) and Section 1(b) (App., *infra*, p. 62). Neither of these Sections diminishes, however, the Commission's statutory obligation to control the abandonment or discontinuance of a jurisdictional service by the standards of public convenience and necessity. In any event, since petitioner has commenced the service authorized, it seems clear that petitioner's contentions are not ripe for judicial review since they basically challenge the Commission's power under Section 7(b) and could be raised in an abandonment proceeding, or an enforcement proceeding under Section 20, 15 U.S.C. 717s, if petitioner chose, regardless of the duration of the certificate issued under Section 7 (c) and (e).

1. *The provisions of Section 7(a) do not require the Commission to grant petitioner a limited-term certificate.*—Petitioner's reliance on Section 7(a) (App., *infra*, p. 66) is based on its premise that the certificate issued to it will require it to dedicate greater quantities of gas than covered by the contract, and its belief that the Commission may never require a natural gas company to invest more capital assets than its management has determined. Petitioner errs in both respects.

a. In the first place, the certificate of indefinite duration will not necessarily require petitioner to

dedicate quantities of gas in addition to those covered by its contract with United. While, under the contract, petitioner has agreed to make sales for a basic term of twenty years, contrary to its assertions (Br. p. 4, fn. 1), the amount of gas to be delivered during that period is not a fixed quantity. Even disregarding the provisions for annual redetermination of the reserves available for sales under the contract, United may take the annual contract minimum each year or as much as one and a half times that minimum. If United elects to take less than the maximum allowed by the contract, some of the gas which petitioner contemplated might be sold under the contract would remain unsold at the end of the contract term.[21] In that event, even if neither the certificate nor the Commission at a later date were to permit abandonment at the end of the contract term, petitioner would not be required to sell more gas than the maximum quantity covered by the contract until the entire quantity of gas that might have been sold under the contract was *in fact* sold to United at some indeterminate date beyond the twenty-year term.

b. Section 7(a) reflects congressional awareness of the importance of uninterrupted service to customers and confers authority upon the Commission to order a natural gas company to extend or improve its transportation facilities, to establish physical connection of

[21] We are assuming, for the sake of this discussion, that the reserves will not be depleted prior to the end of the primary term of twenty years, although that possibility in fact exists. *Supra*, p. 4.

its transportation facilities with those of a local distributor, and to sell gas to such distributor.

Congress placed a limitation upon this authority by including a proviso in the Section that the Commission may not "compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers." This limitation does not support, however, petitioner's broad assertion (Br. p. 21) that the Commission is prohibited from taking any action that might restrict managerial judgment as to the investment of its assets.

In Panhandle Eastern Pipe Line Co. v. *Federal Power Commission,* 204 F. 2d 675 (C.A. 3), upon which petitioner relies for this proposition, the Court of Appeals held only that the Commission could not require a pipeline to enlarge its facilities in order to eliminate unlawful discrimination in service among its customers. In so holding, the court expressly recognized (204 F. 2d at 682–683) that the Commission may require the investment of capital contrary to the judgment of management by ordering a gas company to improve its existing facilities. *Central West Utility Co.* v. *Federal Power Commission,* 247 F. 2d 306 (C.A. 3), likewise pointed to by petitioner, also involved the matter of enlargement of pipeline facilities so as to eliminate illegal discrimination.

The fact that the Commission is specifically prohibited from ordering a pipeline company to enlarge its facilities does not mean that it is similarly pre-

cluded from ordering a natural gas company to sell available gas through its existing facilities. Indeed, Section 7(a) explicitly empowers the Commission to order a natural gas company to sell natural gas to distributors with whom the company has been required to make physical connection. While Section 7(a) would not normally be applicable to independent producers since they usually do not serve local distributors directly, the Section does enable the Commission to order a pipeline with its own production properties to sell gas available to it from its operating wells up to the limit of its pipeline capacity. Certainly, Section 7(a) does not operate in favor of petitioner's position in this litigation.

2. *The applicability of Section 7(b) to jurisdictional services is not limited by the "production or gathering" exemption of Section 1(b).*—Petitioner's claim (Br. pp. 21–25) that Commission control over abandonment of service is in conflict with the "production or gathering" exception in Section 1(b) (App., *infra*, p. 62) is not only without merit but should not be considered by this Court since this objection to the order under review was not raised in petitioner's application to the Commission for rehearing. It has been raised for the first time in petitioner's brief on the merits here.

a. The entire basis of petitioner's contentions heretofore has been that the certificate was improperly conditioned by requiring a sale of more gas for a longer period than that requested. As we have pointed out, *supra*, pp. 50–51, the certificate imposes no

affirmative obligation of this kind.[22] It is true, however, that upon commencement of service under a certificate not limited in duration, petitioner will not be able to discontinue its service so long as the abandonment provisions of Section 7(b) are applicable to its sales and service. As this Court recognized in *Atlantic Refining Co.* v. *Public Service Commission of New York,* 360 U.S. 378, 387, the dedication to the interstate market does not result from grant of a certificate of public convenience and necessity but from service performed thereunder. See also *Sunray Mid-Continent Oil Company* v. *Federal Power Commission,* 270 F. 2d 404 (C.A. 10).

In now relying on the production or gathering exception, petitioner directly attacks the applicability to it of the abandonment provisions, as such, regardless of the duration of the certificate. But, in its application for rehearing to the Commission, petitioner expressly disclaimed such an attack (R. 96):

> * * * There is no claim from this Petitioner that it is not required to comply with Section 7(b) of the Natural Gas Act if it desires to abandon any portion of the sale, either as to quantity of gas or length of the sale, that it now proposes be certificated. * * *

[22] Petitioner's attempt to analogize the certificate of indefinite duration issued here to a situation in which the Commission conditions a proposal to sell 10,000 Mcf per day has no substance. In petitioner's example, if service under the certificate authorization is commenced, the producer can only deliver the contract amount if he also delivers the additional 5,000 Mcf per day. Here, on the other hand, the producer is not compelled to deliver any more gas than that covered by the contract in order to fulfill its contract obligation.

Accordingly, this Court lacks jurisdiction to consider this objection. Section 19(b) of the Act (App., *infra*, pp. 69–70), upon which this Court's jurisdiction depends, provides:

> * * * No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. * * *

The decisions of this Court require a strict compliance with this limitation. In *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 324 U.S. 635, this Court rejected Panhandle's objection that the actual legitimate costs of its production properties and gathering facilities could not be included in its rate base because such action would supposedly constitute an assertion of jurisdiction over "the production or gathering of natural gas" contrary to Section 1(b) of the Act. One basis for the Court's decision was that Panhandle had failed in its application for rehearing before the Commission to raise this objection. Four Justices concurred on that ground alone. 324 U.S. at 650. Thereafter, in *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, this Court held that Section 19(b) precluded a reviewing court from even considering such an objection *sua sponte*. No basis for departure from these opinions can be shown to exist here.

b. Should this Court nevertheless reach the merits of this attack by petitioner upon the applicability of Section 7(b) to the abandonment of a producer's

service, the decision in *Phillips Petroleum Company* v. *Wisconsin*, 347 U.S. 672, demonstrates the fallacy of petitioner's claim and of its reliance on *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498. In *Phillips*, this Court held that wholesales in interstate commerce made by independent producers and gatherers of natural gas are subject to the Act, despite the fact that, aside from selling the gas, they engage only in production and gathering, both of which operations are in other respects not subject to the Commission's jurisdiction. Petitioner does not question the Commission's jurisdiction over its sales in interstate commerce or the facilities required to make those sales.

Petitioner's argument—that the Commission cannot require it to sell gas by refusing to grant it abandonment permission—is almost identical to the argument rejected by this Court in *Phillips* that the "business" of making sales in interstate commerce is exempt from regulation since, viewed from an economic standpoint, the sales were the ultimate objective of production and gathering and thus came within the "production or gathering" exemption (347 U.S. at 681). *Phillips* held that Congress intended the interstate sales of producers to be regulated effectively (see *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U.S. 507, 520).

Because control over the abandonment of service is necessary if rate supervision is to be effective, abandonment jurisdiction must be as broad as the Commission's jurisdiction over sales. Nevertheless, the Commission does recognize that a proper accom-

modation between federal and local interests precludes it from interfering with legitimate state conservation orders relating to the production or gathering of gas. Accordingly, Section 157.30 of the Commission's regulation, which relates to the abandonment of service by independent producers (18 C.F.R. 157.30 (1958 Supp.)), provides:

> * * * That nothing herein shall be construed as interfering or as intended to interfere with or prevent compliance by a natural gas company with valid conservation orders of a State agency relating to the production or gathering of natural gas.

Further supporting the Commission's power to control abandonment of sales is the fact that the Act, as recognized in *Phillips* (347 U.S. at 682), was to "plug the 'gap'" resulting from constitutional limitations on state regulation of the natural gas industry; the states do not, and cannot, undertake to regulate abandonment of interstate sales as such. Cf. *Cities Service Gas Company* v. *State Corporation Commission of Kansas*, 355 U.S. 391; *Natural Gas Pipeline Company* v. *Panoma Corporation*, 349 U.S. 44.[23] And, as stated in *Interstate Gas Co.* v. *Federal Power Commission*, 331 U.S. 682, at 690:

[23] In *Panoma*, the Court held that state fixing of a minimum price to be paid for natural gas, after its production and gathering has ended, by a company transporting gas for resale in interstate commerce is inconsistent with *Phillips*, which had held that the Commission's jurisdiction over such sales is exclusive. In *Cities Service*, the Court, relying on *Phillips* and *Panoma*, held that a state cannot lawfully fix a minimum price at the wellhead to be charged for, or attributed to, natural gas to be sold in interstate commerce for resale.

> * * * In denying the Federal Power Commission jurisdiction to regulate the production or gathering of natural gas, it was not the purpose of Congress to free companies such as petitioner from effective public control. * * *

Moreover, abandonment by independent producers of sales which are otherwise subject to the Act can have as disastrous an effect on the public as cessation of service by a pipeline or an integrated natural gas company. See *J. M. Huber Corp.* v. *Federal Power Commission*, 236 F. 2d 550, 558 (C.A. 3), certiorari denied, 352 U.S. 971. As this Court noted in *Phillips* (347 U.S. at 685):

> Regulation of the sales in interstate commerce for resale made by a so-called independent natural-gas producer is not essentially different from regulation of such sales when made by an affiliate of an interstate pipeline company. In both cases, the rates charged may have a direct and substantial effect on the price paid by the ultimate consumers. Protection of consumers against exploitation at the hands of natural-gas companies was the primary aim of the Natural Gas Act. * * *

Federal Power Commission v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, upon which petitioner relies, does not support its position. The question there was whether a pipeline could abandon, not the service made possible by its exempt gathering facilities required for that service, but other facilities underlying the service (*i.e.*, certain gas leaseholds). The leased acreage of which the company sought to

dispose was undeveloped and thus remote from its current operations. The Court rejected the Commission's reliance on Section 7(b) because it had not been shown that the leases were jurisdictional facilities. Indeed, it was clear that those leases were not being used for any service or sale then being made.

Here, on the other hand, there is no question that the petitioner's service is jurisdictional, *i.e.*, covered by the Act. Accordingly, as in *Phillips*, the consequential effect that valid Commission regulation may have on "production or gathering" does not divest the Commission of its expressly granted jurisdiction over new service. It should also be noted that the states can and do regulate transfers of gas leaseholds (337 U.S. at 503), but not abandonment of interstate services.[24]

3. *Petitioner's claim that the Commission abandonment authority is limited by Sections 1(b) and 7(a) is premature.*—The arguments based on the exceptions to Section 1(b) and Section 7(a) are in reality assertions that the Commission has no jurisdiction to compel sales by preventing abandonment of petitioner's service to United. These contentions, going as they do to abandonment, are not pertinent to the issuance of a certificate of indefinite duration. More-

[24] Moreover, in the *Panhandle* case, this Court relied upon the fact that Commission had never previously asserted the right to regulate transfers of gas leases, 337 U.S. at 513. By contrast, the Commission has from the inception of the Act asserted jurisdiction over proposed abandonments by natural gas companies producing gas. *E.g.*, *Cabot Gas Corp. and Godfrey L. Cabot, Inc.*, 3 F.P.C. 357 and 582; *Panhandle Eastern Pipe Line Co.*, 11 F.P.C. 167, 172.

over, by issuing a certificate without a time limitation, the Commission has not required petitioner either to invest additional capital or to make involuntary sales. See *supra*, pp. 50–51. Such action can only occur if (1) petitioner's reserves underlying the sales to United involved here are not depleted when the contract expires, (2) petitioner seeks to discontinue its service to United, and (3) the Commission does not then grant permission to abandon that service.

Conceivably, if service under the certificate had not commenced, petitioner, prior to dedicating its gas reserves here involved to the interstate market, might have been thought entitled to a full declaration of its rights under the certificate issued. *Sunray Mid-Continent Oil Company* v. *Federal Power Commission*, 270 F. 2d 404, 407–408 (C.A. 10). However, even then the remoteness and hypothetical nature of the question presented should have precluded review. See, *e.g.*, *Eccles* v. *Peoples Bank*, 333 U.S. 426; *California Oregon Power Co.* v. *Federal Power Commission*, 239 F. 2d 426 (C.A.D.C.). But since petitioner has indicated its willingness to sell gas for the term of the contract and has in fact commenced that service, *supra*, p. 6, any issue relating to the Commission's authority to require sales twenty years from now which does not depend on the terms of the certificate—and the arguments based on Sections 1(b) and 7(a) are unrelated to the terms or duration of the certificate now under review (*supra*, pp. 50–54)—is clearly too conjectural to permit review at this time. See *e.g.*, *Eccles* v. *Peoples Bank*, 333 U.S. 426; *Rochester Telephone Corp.* v. *United States*, 307 U.S.

125; *Sunray Mid-Continent Oil Company* v. *Federal Power Commission*, 270 F. 2d 404, 405–407 (C.A. 10).

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below should be affirmed.

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MARCH 1960.

APPENDIX

The Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717, *et seq.*, provides in pertinent part as follows:

Section 1 [15 U.S.C. § 717]:

(a) As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

* * * * *

Section 4 [15 U.S.C. § 717c]:

(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the

Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission, and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The

Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided*, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by

order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

Section 5 [15 U.S.C. § 717d]:

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with

the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

* * * * *

Section 7 [15 U.S.C. 717f]:

(a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted

to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or

denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

* * * * *

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

* * * * *

Section 19 [15 U.S.C. § 717r]:

(a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this act to which such person, State, municipality, or State commission is a party may apply for a

rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. * * * Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have

been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. * * * The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 335

SUNRAY MID-CONTINENT OIL COMPANY, *Petitioner*

v.

FEDERAL POWER COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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APRIL, 1960

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1. In its brief, the Commission undertakes to state Sunray's position as one seeking "an advance authorization to cease *** service at the expiration of the contract" (Com. Br., p. 14, see, also Com. Br., pp. 16, 23, 27, 32). In accordance with this characterization, the Commission asserts that such authorization cannot be given at this time since it is not known what the situation will be at the expiration of Sunray's contract (Com. Br., pp. 16, 27, 32), and further that Sunray has "failed to demonstrate that abandonment of its service at the termination of its sales contract is permitted or required by the public interest" (Com. Br., pp. 32-36).

In so urging, the Commission misstates Sunray's position. In our view, there is no question of abandonment or of advance authorization to discontinue the sale of gas presented in this case. Here Sunray has filed an application for a certificate to sell gas to a pipeline purchaser for a

term of twenty years as set forth in that contract. The sole question is, does the Natural Gas Act vest general authority in the Commission, nevertheless, to issue a certificate for a longer period of time, *i.e.*, for an unlimited duration?

Sunray is not asserting any right to abandon or discontinue sales during the contract period.

It is Sunray's position that upon the filing of its contract and application, the sole question for decision by the Commission is whether the issuance of a certificate for the 20-year period set out in the contract and the application is in the public interest as provided in Section 7(e).

It is also worthy of note at this point that, in its statement of Sunray's position, and indeed throughout its brief, the Commission repeatedly characterizes the sale of gas by Sunray to United under this 20-year contract as constituting "service" under the Act. But Section 7(e) expressly provides that:

> *** a certificate shall be issued to any qualified applicant therefor, authorizing *the whole or any part of the* operation, *sale*, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. *** (Italics supplied).

Significantly, Section 7(e) treats "sale" as something different from "service." What is involved here is a sale of gas by Sunray to United and hence the applicable provisions of Section 7(e) are "a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the ***, sale, *** covered by the application, if it is found *** that the proposed ***, sale, ***, to the extent

authorized by the certificate, is or will be required by the present or future public convenience and necessity." This language, on its face, denies to the Commission authority to issue a certificate for a new sale for a term longer than that set out in the application and underlying contract.

2. (a) The Commission apparently formulates the issue as it does because in its view certificates of public convenience and necessity are presumptively to be indefinite in duration. In our main brief (at pp. 12-14), we have shown that the clear terms of Section 7(e) authorize the Commission to issue certificates for periods of time no greater than that requested by the applicant and provided in its sales contract. In addition, we have shown that the Commission's presumption is at odds, *inter alia*, with (1) the "production and gathering" exemption of Section 1(b) of the Act at least as far as producer applications are concerned (main brief, pp. 21-25); and (2) this Court's holding in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), that in view of the Act's preservation of private contracts, the Commission's functions under the Act are generally limited to supervision and control of these contracts (main brief, pp. 28-43).[1]

(b) In addition to invoking the abandonment provision of Section 7(b) (discussed *infra*, pp. 10-15), the Commission seeks to limit both this Court's decision in *Mobile* and the impact of Section 1(b). As to *Mobile*, the Commission in effect claims (Com. Br., pp. 45-46, 49), that that decision involved only a construction of the rate provisions of the Act and does not bear upon the fundamental nature of the Act or the Commission's responsibilities thereunder.

[1] We have also pointed out (main brief, pp. 18-21) that Section 7(a), upon which the court below relied, does not vest the Commission with sweeping powers to assure continuity of service. In its brief, the Commission, while seeking to accord a broad scope to Section 7(a), nevertheless, recognizes that that Section normally does not apply to sales by producers (Com. Br., pp. 51-53). Even assuming the breadth urged by the Commission for Section 7(a) (but see our main brief at pp. 18-21), this recognition by the Commission sharply undercuts the reliance by the court below on this Section.

Our main brief (at pp. 31-32) anticipated this argument by the Commission and analyzed *Mobile* from this point of view; we there demonstrated that while *Mobile* immediately involved a question as to the Act's rate provisions, the Court's opinion defined the interrelationship between the Natural Gas Act and private contracts generally; its holding as to the limited scope of the Commission's functions under the Act similarly was intended to be of general applicability.

(c) As to the "production and gathering" exemption in Section 1(b), our main brief (at pp. 22-25) showed, by reference, among others, to *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949), that since a certificate of unlimited duration has the effect of compelling a producer to deliver more gas than he is willing to dedicate to the interstate market and hence of forcing him physically to produce more gas, such a certificate improperly invades the area of production and gathering of natural gas which the Act specifically excludes from the Commission's jurisdiction.

In response, the Commission urges that this argument has already been rejected in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954), (Com. Br., pp. 55-56).[2]

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[2] The Commission also suggests that the Section 1(b) argument may not now be considered because allegedly not raised by Sunray in its petition for rehearing (Com. Br., pp. 53-55). This claim is predicated on the erroneous notion that Sunray's argument from Section 1(b) relates to an advance authorization for permission to abandon. As shown in the text, Sunray has invoked the exemption in Section 1(b) as further support for its position that the Natural Gas Act does not vest the Commission with broad powers to assure continuity of service and hence that the Commission may not issue to a producer a certificate for a longer period than that requested in his application. Since Sunray's petition for rehearing clearly asserted error on those grounds (R. 90-101), its reliance upon Section 1(b)'s exemption in support thereof is not precluded by Section 19(b). *Cf. May Stores Co.* v. *National Labor Relations Board*, 326 U.S. 376, 386, fn. 5 (1945).

In this connection, it is also noteworthy that the Commission's prematurity argument (Com. Br., pp. 59-60) is predicated on the same erroneous theory of "advance authorization" and, in any case, extends only to Sections 1(b) and 7(a). For the reasons just mentioned, this argument likewise has no merit. See, also, Com. Br., p. 6, fn. 1.

But while in *Phillips*, this Court held that a producer's sales of gas for resale in interstate commerce are subject to rate regulation under the Natural Gas Act, the Court in its opinion was careful also to point out that even as narrowly construed, the "production and gathering" exemption of Section 1(b), nevertheless, excluded from Commission regulation the physical activities of production and gathering including, of course, the actual production of natural gas (347 U.S. at 678).[3] See *Saturn Oil & Gas Co.* v. *Federal Power Commission*, 250 F. 2d 61, 68 (C.A. 10, 1957), certiorari denied, 355 U.S. 946 (1958).

Equally without substance in this connection is the Commission's effort to distinguish *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949), on the ground that the leases there involved were "undeveloped and thus remote from [the company's] current operations" (Com. Br., p. 59). Not only did the Commission's brief in that case present an entirely different picture (see Brief for the Federal Power Commission in No. 558, Oct. Term, 1948, *passim*), but the Court's opinion accorded no weight to that fact. Rather, it accepted at face value the Commission's arguments that a contrary result would impair the Commission's power to assure continuity of service, and held, nevertheless, that Section 1(b) precluded Commission control over the transfer of these leases. See 337 U.S. at 507 *et seq.*

3. Although at one place in its brief (Com. Br., p. 43),

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[3] Further arguing from *Phillips*, and the reference therein to the Act's purpose to "plug the 'gap'" resulting from constitutional limitations on state regulation of the natural gas industry (347 U.S. at 682), the Commission asserts that "the states do not, and cannot, undertake to regulate abandonment of interstate sales as such" (Com. Br., p. 57). This, however, ignores the other side of the coin; what from the Commission's point of view may be a question whether or not to require continued delivery of gas is from the state point of view a question whether to permit the continued production of gas. It is well established that the power to control the production of gas is in the states. An invasion into this area thus reserved to the states results when a certificate of unlimited duration is issued to a producer seeking a certificate limited in duration to the terms of his underlying sales contract.

the Commission purports to recognize that Congress, in enacting the Natural Gas Act, manifested a concern for the legitimate interests of natural gas companies as well as for those of the consumers, the Commission's brief dwells exclusively upon the asserted needs of the consumers and at no time gives any effect to the legitimate interests of the natural gas companies. Indeed, without in any way questioning the producers' needs periodically to reappraise their production and sales of natural gas, the Commission not only pointedly excludes these needs from its discussion but goes further and undertakes to disparage them as purely selfish desires on the part of producers, for what the Commission implies to be excessive profits (see Com. Br., pp. 7, 10, 14, 15, 28, 32, 35).

In contrast, however, construing the Natural Gas Act as authorizing the Commission to issue certificates only for the time period set out in the application and the producer's sales contract results in an appropriate accommodation of the needs and legitimate interests of both the consumers and the producers. On the one hand, such certificates give the consumers assurance of a 20-year supply of gas.[4] Although this does not guarantee gas for the indefinite future, assurance of gas for such an extended period very nearly approximates such a guarantee at least as far as the present day gas consumers are concerned. And certainly, no potential consumer of gas will be deterred from utilizing gas because a gas supply is assured for a 20-year period rather than indefinitely.

On the other hand, as pointed out in our main brief (at pp. 44-51), most natural gas producers are, because of geological factors, also substantial producers of oil. Oil is also a competing fuel with natural gas and, on the basis of

[4] As indicated in our main brief (at p. 28, fn. 15), the overwhelming majority of producer sales contracts are for 20 years or more. Moreover, the Commission may take into account the duration of the producer's gas sales contract in determining whether the sale contemplated by the application and the contract is required by the public convenience and necessity.

comparative heat content, the average well-head price of gas is only one-fifth that of crude oil. Consequently, every diversion of an existing or potential consumer of oil to natural gas operates to reduce the producers' revenues to 20% or less of what they would have been. Because of this interaction between the natural gas and oil segments of his business, a producer needs to be able periodically to review and revise, if necessary, his gas production and sales commitments in light of their impact upon his financial stability as a single enterprise engaged in the production and sale of both natural gas and oil. Certificates coextensive with the terms of the producer's sales contracts give effect to these legitimate needs of the producers.[5]

4. (a) In urging that Section 7(e) generally authorizes the Commission to issue certificates of unlimited duration even though the application therefor requests a certificate of limited duration in accordance with the underlying sales contract, the Commission claims that the contrary result would in effect require the Commission to grant certificates "on the time terms specified by the producer ***, no matter how short that time limit may be" (Com. Br., p. 15) and on "terms whether or not the public convenience and necessity will be advanced" (Com. Br., p. 17). This would mean, the Commission asserts, that "a natural gas company could dictate the terms and conditions of every certificate, par-

[5] The Commission claims (Com. Br., p. 35) that the Court should not consider the legitimate needs of the producers since not called to the Commission's attention in the administrative proceedings. This contention is based upon the same unsound premise as the Commission's further suggestion (Com. Br., p. 29) that the Natural Gas Act left the balancing of the consumers' and producers' interests with the Commission. The fact is that Congress itself struck the balance in enacting the Natural Gas Act and did not leave the matter to the Commission. The problem then requires the ascertainment of the Congressional intent in enacting the Natural Gas Act, and hence just as the Commission regards itself as free, as it has sought to do here (see Com. Br., pp. 24-30) and has done frequently in the past, to press upon the Court economic and regulatory reasons in support of its construction of the Act, so, too, Sunray believes it to be appropriate for it to apprise the Court of the legitimate economic interests of the producers in opposition to the Commission's construction.

ticularly the length of its commitment to serve" (Com. Br., p. 17), a result, which according to the Commission, would be highly improper since "there is nothing in the Section to suggest that a natural gas company may dictate the terms upon which the certificate is issued" (Com. Br., p. 21).

But such is not the result of recognizing an applicant's right to stand firm on the terms of his proposed sale. In addition to adverting to this Court's recent reaffirmance in *Atlantic Refining Co.* v. *Public Service Commission of the State of New York*, 360 U.S. 378, 387-388 (1959), of such a right in an applicant, we explained in our main brief how this right does not enable applicants to dictate the terms and conditions of certificates issued by the Commission (main brief at p. 17):

> Under the Natural Gas Act, the Commission has the responsibility for determining whether a proposed sale will be in the public interest and, consequently, the Commission need not, indeed cannot, authorize a sale of gas unless it finds that the sale, including the terms and conditions on which the producer is willing to make it, is in the public interest. Only if the Commission finds that the terms proposed by the applicant coincide with the public interest need it issue the certificate. If it finds that the public interest will not be served by sanctioning the sale on the terms specified by the application, the Commission is required by Section 7(e) to deny the application.

With the Commission thus retaining the responsibility to determine whether the sale on the terms proposed by the applicant would be in the public interest, the applicant cannot "dictate" the terms of any certificate issued by the Commission.

(b) The Commission also asserts that the legislative history of Section 7(e) shows that Congress added that provision to the Natural Gas Act in 1942 in order to provide more effective control over the initiation of new sales or service by natural gas companies (Com. Br., pp. 18-22).

We agree that the legislative history referred to by the

Commission reveals a Congressional intent to require Commission approval before any new gas sale may be undertaken. Sunray fully accepts that it may not make a new sale of gas for resale in interstate commerce without first having obtained a certificate of public convenience and necessity from the Commission, and, indeed, has applied for such a certificate in this case.

However, a Congressional intent to vest complete control in the Commission over the *initiation* of new sales of gas has no bearing on the period that that sale is to be made. And as to the latter, Congress, in providing for the issuance of certificates generally, further provided that the certificates issued should not be for a period longer than that set out in the application and sales contract. This intent Congress made clear by the provision in Section 7(e) empowering the Commission to issue certificates "authorizing the whole or any part of the ***, sale, *** covered by the application." The issuance of certificates of limited duration is fully consistent with the Congressional purpose as stated by the Commission. Moreover, there is nothing in the legislative history to suggest that Section 7(e) as enacted did not accurately reflect the intent of Congress in this regard or that despite the clear statutory language, Congress intended the certificates issued under Section 7(e) to be of indefinite duration.

(c) The Commission further suggests that the language of Section 7(e) is in fact not plain. According to the Commission, although Section 7(e) provides for Commission authorization of "the whole or any part of the operation, sale, service, *** covered by the application," an application for a certificate to sell gas necessarily embraces a request for permission to perform a service as well (Com. Br., pp. 22-23).

But in view of Section 7(e)'s differentiation between "sale" and "service" and Section 7(b)'s limitation to "facilities" and "service," we are unable to see how the Commis-

sion brings about this *tour de force*.[6] However, even if such merging of "***, sale, service, ***" into "service" so as to write "sale" out of Section 7(e) were proper [7] the Commission's position would not be advanced. The Commission's authority to issue certificates under Section 7(e) would still be limited to "the whole or any part of the ***, service, *** covered by the application"; even as so read, the Commission's power under Section 7(e) does not extend to the issuance of certificates embracing more or greater "service" than covered by the application.

The Commission seeks to make up for this deficiency by claiming that when read together with Section 7(b), "service" means "the continuous furnishing of the gas to the purchasers" (Com. Br., p. 23). Here, again, the Commission's reading goes too far. Section 7(b) does not contain a general prohibition against abandonment without Commission approval such as would be necessary to justify the

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[6] The fact that a gas sales contract provides for the delivery of gas over a period of time, does not, contrary to the Commission's suggestion (Com. Br., pp. 22-23, Com. Br. in No. 321 at pp. 16-17), convert the sale of gas into a "service." In attempting to amalgamate "sale" with "service," the Commission overlooks the fact that while the Natural Gas Act applies generally to "natural gas companies," such companies fall generally into two separate and distinct classes, *i.e.*, pipeline companies and producers, each engaged in different aspects of the natural gas industry. In contrast to pipeline companies which plainly provide service, producers do not. As stated in *Gulf Oil Corporation* v. *Federal Power Commission*, 255 F. 2d 556, 557 (C.A. 5, 1958), "producers are in reality selling gas which they own and are not, in the traditional sense, primarily furnishing a service to the public."

[7] In support of its deletion of "sale" from Section 7(e), the Commission relies on the further language of Section 7(e), which, according to the Commission, requires that "before a certificate is issued, the applicant must be willing to perform the service proposed" (Com. Br., p. 22). However, Section 7(e) extends not only to "sale, service," but to "operation, *** construction, extension or acquisition ***" as well. The Commission has consistently regarded "construction" as a matter separate and distinct from "operation," and, when appropriate, has authorized construction of facilities without simultaneously authorizing their "operation." Such "construction," it follows under the Commission's theory, would also constitute "service," a patently absurd result. Overlooked by the Commission in making its argument is the provision of Section 7(e) requiring that the applicant be able and willing "to do the *acts* *** proposed." (Italics supplied). It is this provision which is applicable to "sales" and "construction" as used in that Section.

Commission's broad reading. To the contrary, by its express terms, Section 7(b) requires Commission approval of abandonment only of "*** facilities subject to the jurisdiction of the Commission or of *any service rendered by means of such facilities*, ***" (Italics supplied). Thus, Section 7(b) on its face does not extend to all "service" provided under the Act, even if it be assumed that "sales, service" in Section 7(e) can be read as "service"; rather Section 7(b) applies only to certain "service" as delineated by that Section's express terms.[8] Indeed, when in *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 509 (1949), the Commission sought similarly to read into Section 7(b) a broad policy to assure continuity of service, this Court pointed out (*ibid.*):

> The argument begs the question. The section *** covers only "facilities subject to the jurisdiction of the Commission."

A thorough search of the Natural Gas Act reveals a complete absence of any provision directly imposing responsibility upon the Commission to assure continuity of service to the consumers. This is in sharp contrast to the Federal Power Act, which provides in Section 207 (16 U.S.C. 824f):

> Whenever the Commission, upon complaint of a State commission, after notice to each State commission and public utility affected and after opportunity for hearing, shall find that any interstate service of any public utility is inadequate or insufficient, the Commission shall determine the proper, adequate, or sufficient service to be furnished, and shall fix the same by its order, rule, or regulation: *Provided*, That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel

[8] The legislative history of Section 7(b) discussed by the Commission (Com. Br., pp. 30-31) does not require any broader reading of that Section. To the contrary, the testimony and proposed amendment of Mr. Benton, cited by the Commission, support a far narrower result, at least as far as sales by a producer to a pipeline company are concerned. For a producer, unlike a pipeline company, is not a company "which is supplying gas to a public utility company, engaged in distributing such gas to the public" (see Com. Br., p. 30, fn. 10).

> the public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers.

The provision of the Natural Gas Act most nearly comparable thereto is Section 7(a). This provision not only is far narrower than the Power Act's Section 207 (see main brief at pp. 18-21) but, as the Commission concedes (Com. Br., pp. 51-53), it is not even applicable to sales of gas by independent producers.

5. (a) The Commission further argues that the purpose and policy of Section 7(b), as read by it, are infused into Section 7(e) (Com. Br., p. 25). But this argument appears inconsistent with the Commission's position in its memorandum filed with this Court in the earlier *Sunray* case (*Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, No. 814, Oct. Term, 1956,* at pp. 4-5):

> Although Section 7(b) precludes abandonment of service rendered by facilities subject to the Commission's jurisdiction without compliance with the procedures there set out, there is nothing in that Section or its legislative history, or in Sections 7(c) and 7(e) or their legislative history to require a ruling that Section 7(b) in any way restricts the power of the Commission under Sections 7(c) and 7(e) to issue certificates of limited duration.
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> • • •
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> *** Section 7(b) deals with the abandonment of service being provided under a certificate issued earlier, whereas the court's reading of Sections 7(c) and 7(e) permits the Commission initially to issue certificates which authorize service for a limited period of time.

Sunray's reading of Section 7(b) is in complete harmony with this earlier view of the Commission. See main brief at pp. 13-14.

(b) Failure to accept its proposed infusion of Section 7(b) into Section 7(e), the Commission now predicts, would

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* In the earlier *Sunray* case the Commission, in rejecting Sunray's application for a certificate of limited duration, initially took the position that it was completely without authority to issue such certificates. See main brief, p. 4 and fn. 3.

hamstring regulation under the Natural Gas Act. Thus, it states:

> *** if a natural gas company could abandon these services at will, rate regulation would be subject to coercion by the regulated companies threatening to cease services upon which the public has become dependent. ***. (Com. Br., p. 25).

In the same vein, it foresees drastic adverse effects upon service to the gas consuming public if "numerous sources of supply might become unavailable to a pipeline within a short period of time" (Com. Br., p. 28).

These predictions by the Commission, however, ignore what the Commission carefully points out elsewhere in its brief (Com. Br., p. 54; see, also, R. 94), *i.e.*, Sunray's recognition that there could be no discontinuance of the sale of gas short of the term set out in a certificate of limited duration without Commission approval. See, also, main brief at p. 14. With an obligation thus not to discontinue the sale of gas during the 20-year term of its certificate, natural gas companies are hardly in a position to abandon service "at will" (Com. Br., p. 25) or "as they pleased" (Com. Br., p. 24, fn. 8). In these circumstances, certificates of limited duration neither impede effective regulation nor enable producers to "coerce" the Commission by threatening to discontinue their sales of gas.

The Commission, in its pessimism, also overlooks the fact that the vast majority of producer sales contracts are for a basic term of 20 years or more. *Supra*, p. 6, fn. 4. Not only does this assure a supply of gas for an extensive period, but, as shown in our main brief (at pp. 26-28), such long-term commitments fully comply with the Commission's public interest standards for issuing certificates to pipeline companies. Indeed, the Commission has issued certificates to pipeline companies for new service where the gas supplies shown had deliverability lives of substantially less than 20 years. Since the Commission regards such limited gas supplies are adequate to justify the issuance of certificates

to pipeline companies as in the public interest, it is difficult to see how a 20-year commitment of gas by the producer would, under the Commission's standards, be harmful to the public interest.

The Commission seeks to distinguish its actions in pipeline cases by falling back upon experience. In the Commission's words, "the Commission accepts such proof [*i.e.*, of reserves with deliverability lives of less than 20 years] as sufficient because the pipelines have over the years demonstrated their ability to seek and add new reserves to support services already initiated, as well as to warrant expansion" (Com. Br., p. 29, fn. 9). With the pipelines thus being able freely to add new reserves, there is no reason why they cannot with equal facility replace the supply lost at the termination of a particular producer gas sales contract. Thus, the very past experience, relied on by the Commission, plainly demonstrates the invalidity of the Commission's prediction of impaired service to the consuming public resulting from the producer's right to terminate his sale at the expiration of his contract.

That the Commission's predictions constitute mere idle speculation is further demonstrated by the fact that prior to this Court's decision in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954), the Commission did not exercise any jurisdiction over the producers, and consequently, the producers were free from Commission control with regard to the termination of their sales. Yet the Commission does not, indeed cannot, point to a single instance in this pre-1954 period in which the dire consequences now predicted by it actually eventuated.[10]

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[10] Further demonstrating the invalidity of the Commission's prediction is the fact that Southern Natural Gas Company, the pipeline purchaser from the various producers involved in the *Sun Oil* and related cases (Nos. 208, 321, 322, 352, 368, this Term), will not lose any of these gas supplies if this Court agrees that the certificates issued to these producers were of limited duration, coextensive with the term of their original gas sales contracts. In each instance, the producer has entered a new contract with Southern to deliver comparable volumes of gas

The Commission's forebodings here call to mind its comparable forecast in *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949), where, in pressing for authority to control the disposition by the pipelines of their gas reserves, the Commission claimed (see 337 U.S. at 509):

> *** since natural gas is the "lifeblood" of a pipeline system, a company by disposing of its gas reserves, unhampered by Commission control, may render itself unable to continue service; consequently, abandonment of facilities and service without consent of the Commission will result.

Ten years have now passed since this Court there rejected the Commission's position. All during this period the pipeline companies have been free to dispose of their gas reserves without Commission's approval. Yet, we know of no instance in which a pipeline has so exercised this right as to effect an abandonment of service without Commission approval.

6. (a) While articulating a recognition that the Natural Gas Act preserves private contracts (Com. Br., p. 36), the Commission, in addition to reiterating its thesis that it is important that it have the power to issue certificates of indefinite duration as part of a comprehensive regulatory scheme (but, see, *supra*, pp. 12-15, and main brief, pp. 28-43), claims "this policy of the Commission does not result in the abrogation of contracts in the natural gas industry" (Com. Br., p. 42). This is so, according to the Commission, because the "possible imposition of a subsequent non-contractual obligation does not *** negate the term provision of the contract" (Com. Br., p. 43).

Such an argument is nothing more than a play on words. Viewed realistically, there can be no doubt that the result of the Commission's rationalization clearly would operate to render the term provision meaningless. Under the Commission's theory, the parties' agreement as to the term of

the contract, whether it be for 20 years, 10 years, 5 years, or even one month, becomes immaterial. In each instance, the certificate issued would, under the Commission's approach, be indefinite in duration and the producer required to deliver gas without regard to the term of the contract until the Commission authorizes discontinuance of the sale.

The Commission's assertion, in support of this argument, that the producer would be free after the expiration of his contract to file new rates, free of contractual inhibitions (Com. Br., p. 43), suggests that in the Commission's view, the Act preserved contracts solely for the burdens they imposed upon the natural gas companies and did not intend these companies to have any of its benefits. Yet the Commission does not refer to anything in the Act or its legislative history which in any way suggests a Congressional intent to provide anything other than an even-handed preservation of private contracts. No such showing could in fact be made, for the Act, in addition to protecting the interests of the consuming public, also recognizes and gives effect to the legitimate interests of the natural gas companies. See *supra*, pp. 5-7. As stated in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, 344 (1956):

> The Act *** affords a reasonable accommodation between the conflicting interests of contract stability on the one hand and public regulation on the other.

Nor is there any merit to the Commission's further argument that despite the Act's preservation of contracts, the modification involved in issuing certificates of unlimited duration is proper since the Act permits modification of contracts in other respects (Com. Br., pp. 43-44). The contract modifications to which the Commission points are all pursuant to express statutory provisions, provisions which vest the requisite authority in the Commission to modify contracts in the particular aspects involved.

Where, however, as this Court held in *Mobile*, the Act does not provide for the modification of the contract in a particular situation, the Commission is powerless to undertake or authorize such modification. In the present case, there is no provision, express or implied, authorizing the Commission to ignore the term provision of a producer's sales contract. To the contrary, as shown, *supra*, pp. 2-3 (see, also, main brief at pp. 12-14), Section 7(e), in so many words, precludes the Commission from issuing a certificate for a period longer than that applied for. A Commission "policy" to issue certificates of indefinite duration does not, of course, furnish the requisite statutory authority.

(b) The Commission also urges that its prior administrative interpretation supports its position and, in accordance with usual principles, is entitled to great weight (Com. Br., pp. 39-42). The fact is, however, that prior to this Court's decision in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), the Commission appears to have been of the view that although the relationships of natural gas companies *inter sese* and with their customers were founded upon contracts, these contracts could be overriden freely under the Act. And in *Mobile*, as here, the Commission relied heavily upon its past administrative practice to support this view. See Brief for the Federal Power Commission in No. 31, Oct. Term, 1955, at pp. 35-40. The Commission's administrative practice here, predicated, as it is, upon the Commission's pre-*Mobile* construction of the Act, is entitled to no greater weight than it was accorded in *Mobile*. See, also, *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 678, fn. 5 (1954).

(c) The Commission further suggests that Section 7(b) must have been intended to apply beyond the contract period because, according to the Commission, termination of service within the contract period would be covered by Section 4(d) (Com. Br., pp. 36-39). But this argument suffers from the infirmity that Section 4(d) concerns rates and matters

relative thereto, and does not reach the termination of a gas sales contract independently of rates.

In contrast to its unequivocal position here, the Commission, in its brief in the *Sun Oil* case (No. 321, this Term at p. 31), recognizes this limitation and urges that there is no reason for not extending Section 4(d) to include termination of "service." Obviously, the reason for not so extending Section 4(d) is that Congress did not so provide. As the Commission well knows, amendments or additions to the Natural Gas Act which the Commission deems desirable are properly directed to Congress, not to this Court.

In support of this extension of Section 4(d), the Commission cites *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 343 U.S. 414 (1952), which, the Commission states, so construed the comparable provision (Section 205(d)) of the Federal Power Act. But in that case, there was no contract subsisting between the parties since it had been invalidated under the Antitrust Laws. Consequently, if Section 4(d) and the allegedly comparable Section 205(d) of the Federal Power Act were to apply to the termination of sales independently of rates, they would be applicable whether or not there were a contract between parties and Section 7(b) of the Natural Gas Act would be completely superfluous.

Moreover, the issue in that case related not to Penn Water's right to discontinue service but rather to the propriety of a Commission order reducing Penn Water's rates and prescribing its continued integrated operation with another company. Penn Water's principal contention was that the Commission's order was improperly based on the provisions of a contract illegal under the Antitrust Laws (see 343 U.S. at 421). This Court, in sustaining the Commission, relied heavily upon Sections 202(a) and 202(b) of the Power Act, provisions which find no counterpart in the Natural Gas Act. And it was only by way of dictum that the Court made the statement now relied on by the Com-

mission.[11] *Cf. Hartford Electric Light Co.* v. *Federal Power Commission*, 131 F. 2d 953, 954 (C.A. 2, 1954), certiorari denied, 319 U.S. 741 (1943).

(d) The Commission also invokes *Thompson, Trustee* v. *Texas Mexican Ry.*, 328 U.S. 134 (1946), a case arising under the Interstate Commerce Act, as demonstrating that Section 7(b) overrides contracts (Com. Br., pp. 46-49). There are several answers to the contention. In the first place, it is clear that the abandonment provision of the Interstate Commerce Act is coextensive in scope with its provision relative to the issuance of certificates of public convenience and necessity. As shown, *supra*, pp. 9-12, such is not the case under the Natural Gas Act. Second, in the *Thompson* case, the proposed termination which the Court held subject to the abandonment provision occurred prior to expiration of the contract. Here, Sunray has recognized that discontinuance of the sale prior to the termination of the 20-year basic term of the contract would be subject to Section 7(b).

Third, as pointed out, *supra*, pp. 1-2, there is no issue here as to abandonment; rather the question concerns the Commission's authority to issue certificate of unlimited duration in the teeth of an application for a certificate coextensive in term with that of the underlying gas sales contract. Finally, as held in *Mobile*, the Natural Gas Act differs sharply from the Interstate Commerce Act in scope and underlying premises. Because of the special needs and characteristics of the natural gas industry, Congress enacted in the Natural Gas Act a statute in which the Commission's functions are restricted generally to supervision and review of contracts entered into by the parties. The Commission's attempt here

[11] In this connection, it is interesting to note that although the Court indicates that "the Commission pointed out" this construction of Section 205(d) of the Federal Power Act (343 U.S. at 423, Com. Br., p. 37, fn. 15), no such argument appears in the Commission brief in that case. See Brief for the Federal Power Commission in *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, Nos. 428 and 429, Oct. Term, 1951.

to limit the scope of *Mobile* to its precise facts finds no warrant or support in this Court's opinion in *Mobile*. See, *supra*, pp. 3-4.

CONCLUSION

For these reasons as well as those set out in our main brief, it is respectfully submitted that the judgment of the court below should be reversed.

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SUPREME COURT OF THE UNITED STATES

No. 335.—October Term, 1959

Sunray Mid-Continent Oil Co., Petitioner, v. Federal Power Commission.	On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[June 27, 1960.]

Mr. Justice Brennan delivered the opinion of the Court.

This case presents an important question under the Natural Gas Act.[1] This question, central to the case, is: When a company, proposing to make, under contract, jurisdictional sales[2] of natural gas in interstate commerce, applies for a certificate of public convenience and necessity as required by the Act, and requests that the certificate be limited in time to the duration of a contract for the sale of gas which it has entered, does the Federal Power Commission have the authority to tender it, instead, a certificate without time limitation?

Petitioner, Sunray Mid-Continent Oil Company, an independent producer of natural gas, entered into a contract with United Gas Pipeline Company, an interstate transmission company. The contract covered considerable acreage owned by, or under mineral lease to

[1] 52 Stat. 821, as amended, 15 U. S. C. §§ 717–717w.

[2] Section 1 (b) of the Act provides that "The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas." 52 Stat. 821, 15 U. S. C. § 717 (b).

petitioner in Vermilion and Lafayette Parishes, Louisiana, in and about what is called the Ridge field. Under it, United agreed to take an annual amount of gas from petitioner equivalent to 4.5625 per cent of petitioner's gas reserves in the area covered by the agreement;[3] and United had the right, in addition, to call for any amount up to 150 per cent of the amount it had annually agreed to take. The term of the agreement was 20 years. The initial price provided was 20.5 cents per thousand cubic feet (Mcf.); and the price was to increase one cent per Mcf. every five years.[4]

Section 7 (c) of the Natural Gas Act provides that "no natural-gas company . . . shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission . . . unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations." This Court held in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, that by virtue of § 1 (b) of the Act, sales of gas by an independent producer to a pipeline "in interstate commerce . . . for resale for ultimate public consumption" came within the scope of the Act.[5] Petitioner had no certificate of public convenience and necessity authorizing sales in interstate commerce from the field in question. Accordingly, in order to carry out its contract with United, it was necessary for petitioner to apply for a certificate from the Commission, which it did.

Petitioner's application for the certificate contained the request that the certificate sought "provide for its own

[3] The amount of the reserves was subject to redetermination during the term of the contract pursuant to its Article IV, but only prospective effect would be given the redeterminations.

[4] Article IX of the contract also provided for adjustment of these prices, by way of upward or downward escalation, in accordance with a price index of the Department of Labor.

[5] See note 2, *supra*.

expiration on the expiration of the . . . contract term so as to authorize Applicant to cease the delivery and sale of gas thereunder at that time." The Commission, upholding its examiner's recommendations, rejected the contentions of petitioner that there should be issued to cover the contract only a certificate limited to the term of the contract itself, and tendered it a certificate without time limitation.[6] 19 F. P. C. 618. Petitioner applied for a rehearing of the Commission's order. Basic to this application was the contention that "The Commission is without authority to issue a certificate to an applicant authorizing more than the whole or some part of the sale covered by the application for certificate of public convenience and necessity . . . ." The Commission denied the rehearing application. 19 F. P. C. 1107.

Petitioner did not avail itself of its undoubted right to stand firm on its own application, and reject the proffered certificate. Cf. *Atlantic Refining Co.* v. *Public Service Comm'n*, 360 U. S. 378, 387–388.[7] Instead it accepted the Commission's certificate and commenced deliveries of gas under it, reserving its rights to object, on review, to the certificate's unlimited nature. The Court of Appeals for the Tenth Circuit rejected petitioner's objections, and affirmed the order of the Commission. 267 F. 2d 471. In view of the importance of the central question presented, to which we have already alluded, we granted certiorari. 361 U. S. 880. We are in agreement with the Court of Appeals, and affirm its judgment.

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[6] The Commission reached this conclusion without dissent. There was one dissent, by Commissioner Connole, from the issuance of the certificate, but only insofar as the Commission failed to attach a rate condition for which the Commission staff had contended. This aspect of the case was not brought before the court below for review in these proceedings.

[7] Of course the economics of the industry might preclude an unyielding assumption of such a position. See 360 U. S., at 394.

The practical reasons behind petitioner's superficially self-abnegating desire to have a limited rather than an unlimited authorization from the Commission are obvious from a study of the Natural Gas Act's provisions. Obvious also is the damaging effect that acceptance of petitioner's central contention would have upon the policies of the Act.

I.

Section 7 (b) of the Natural Gas Act regulates the abandonment by natural-gas companies of their facilities and services subject to the jurisdiction of the Commission.[*] The section follows a common pattern in federal utility regulation[**] in forbidding such abandonment without the permission and approval of the Commission first had and obtained. The Commission is to extend permission for an abandonment of service only on a finding "that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment." The proposal of petitioner was for a certificate that would by its own terms expire when the contract with United expired. Thus at the end of the period, petitioner would become free to cease supplying gas to the interstate market from

[*] The text of the section provides: "No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment." 52 Stat. 824, 15 U. S. C. § 717f (b).

[**] See § 1 (18) of the Interstate Commerce Act, as added by the Transportation Act of 1920, 41 Stat. 477, 49 U. S. C. § 1 (18); § 214 (a) of the Federal Communications Act, as amended by the Act of March 6, 1943, 57 Stat. 11, 47 U. S. C. § 214 (a).

the Ridge area without further leave of the Commission, and without there having been made the findings that Congress deemed necessary.

If petitioner's contentions, as to the want of authority in the Commission to grant a permanent certificate where one of limited duration has been sought for, were to be sustained, the way would be clear for every independent producer of natural gas to seek certification only for the limited period of its initial contract with the transmission company, and thus automatically be free at a future date, untrammeled by Commission regulation, to reassess whether it desired to continue serving the interstate market. And contracts—as did the 1947 contract in the companion case to the one at bar, *Sun Oil Co.* v. *Federal Power Comm'n*, p. —, *post*—might provide for termination in the event of a rate reduction by the Commission. Petitioner's theory, by tying the term of the certificate to the contract, would mean that such a reduction of rates would under those circumstances enable the producer to cease supplying gas, without obligation to justify its cessation of this service as being consistent with the public convenience and necessity.

The consequences of petitioner's argument do not stop there. The identical provisions of the Natural Gas Act regulate pipeline companies as well as independent producers. If producers can insist in their certificates on the inclusion of a provision relieving them in advance from their obligation to continue the supply of gas, as of a date certain, pipeline companies—whose dealings with local distributing companies generally also take the form of a "sale" of gas to them—could insist on a similar provision. If an individual producer were thus left free to discontinue his supply, the transmission company would be forced to find a supplier of gas elsewhere, and make connection with him, to continue its service; and the consumer ultimately would pay the bill for the rear-

rangement. If the pipeline company were left free to cease its service to the local distribution company, a local economy which had grown dependent on natural gas as a fuel would be at its mercy. And this, though the primary practical problem that led to the passage of the Act was the great economic power of the pipeline companies as compared with that of communities seeking natural gas service. See *Federal Power Comm'n* v. *Hope Natural Gas Co.*, 320 U. S. 591, 610.

And there are practical consequences, related to rate control, which are even more concrete. The companion case, *Sun Oil Co.* v. *Federal Power Comm'n*, p. —, *post*, illustrates them. If petitioner's certificate of public convenience must expire with its first contract with United, service after then—under a new contract or otherwise—will require a new certificate. And under that certificate petitioner may file, pursuant to § 4 (c) of the Act,[10] its rates for the "new" service. The only power the Commission would have, under the Act, with respect to those rates, would be to bear the burden of proof in an investigation under § 5 of the Act,[11] that the rates are unjust or

[10] "Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission . . . schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services." 52 Stat. 882, 15 U. S. C. § 717c (c).

[11] In pertinent part, § 5 (a) of the Act provides: "Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferen-

unreasonable, and thereupon order a new rate, solely for prospective application. Last Term in the so-called *Catco* case, *Atlantic Refining Co.* v. *Public Service Comm'n*, *supra*, at 389, we had occasion to remark that "the delay incident to determination in § 5 proceedings through which initial certificated rates are reviewable appears nigh interminable." At oral argument, counsel for the Commission confirmed that no contested major producer's § 5 case had been finally adjudicated by the Commission in the six years since this Court's decision in the *Phillips* case. In contrast to § 5 are the protections that would be available if at the conclusion of the original contract the producer's certificate remained in full force and effect. Then the rates to be charged under a new contract or otherwise would have to be filed as rate changes under § 4 (d) of the Act, with 30 days' notice to the Commission and the public.[12] Under § 4 (e), the Commission, on complaint of any State, state commission, or municipality, or *sua sponte*, may order a hearing on the new rate, and suspend the effectiveness of the rate for five months.[13] At the hearing, the gas com-

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tial, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order . . . ." 52 Stat. 823, 15 U. S. C. § 717d (a).

[12] "Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. . . ." 52 Stat. 823, 15 U. S. C. § 717c (d).

[13] "Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the

pany would have to shoulder the burden of proving that its new rates were just and reasonable. If the hearing were not concluded by the end of the suspension period, the increased rate could be collected *ad interim*; but the Commission is empowered to require the company to collect the increment under bond and accounting, and refund it if it could not make out its case for the increase.

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natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided*, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible." 52 Stat. 823, 15 U. S. C. § 717c (e).

Clearly the rate-change provisions of §§ 4 (d) and 4 (e), rather than the "initial rate" provisions of § 4 (c), are better tailored to the situation that exists when an initial contract of sale of natural gas terminates, and the supply of gas continues, whether under a new contract or without one. When a producer commences interstate sales from a particular field, or when an interstate transmission company commences sales to a local distributing company, there are by definition no existing rates, and accordingly the protective provisions of §§ 4 (d) and (e), which are bottomed on delaying the effectiveness of, and suspending changes, are not relevant. But of course this is not the case where one sales contract expires and service continues; in this situation, where a rate change is proposed, the protective provisions fit as well as they do in the case of a rate change made pursuant to a contract, during its term.

Thus it is apparent that petitioner's position would enable it to make what in practical effect would be rate changes, but without compliance with the procedures of §§ 4 (d) and 4 (e), and subject to revision only in procedures which are likely to "provide a windfall for the natural gas company with a consequent squall for the consumers," as we said in *Cateo*, 360 U. S., at 390. When attached to the leverage of a power to abandon service, at a contract's termination, without contemporaneous Commission approval, this power to exercise contractual control not only over rates but over the mode of their regulation, would be a substantial one indeed. And like the power to force an advance license for the abandonment of the continued supply of gas, the power would be one enjoyed by pipeline companies and producers alike. Further, declaration today of a want of authority in the Commission to issue a certificate of longer duration than that of a sales contract attached to the application would have a retroactive effect; it would at least furnish

a guide to the construction of certificates issued previously on such applications. See *Sun Oil Co.* v. *Federal Power Comm'n*, p. —, *post*.

This Court declared as early as the *Hope Natural Gas* case that the primary aim of the Natural Gas Act was "to protect consumers against exploitation at the hands of natural gas companies." 320 U. S., at 610. We reiterated that declaration last Term in *Catco*, and observed that "The Act was so framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges." 360 U. S., at 388. Against the backdrop of the practical consequences of the petitioner's claim and the purposes of the Act, we look to the details of its argument that the Commission is limited, in granting its certificate of public and convenience and necessity, to a term certificate of the duration petitioner has proposed.

First. Petitioner's argument is based primarily on its construction of § 7 (e) of the Act. That section provides that a certificate of public convenience and necessity shall be issued "to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application." [14] This, petitioner urges, makes it clear that the

[14] "Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the

outside limit of what the Commission may authorize is what the applicant proposes. Further, petitioner urges that the language requiring a finding "that the applicant is able and willing properly to do the acts and to perform the service proposed" negates the Commission's authority to go beyond the time limitations the applicant inserts in its proposal; for it is claimed that it cannot be found that petitioner is willing to do more than what he has proposed. Under petitioner's theory, the abandonment provisions of § 7 (b) would have application only if it was desired to abandon service while the contract was still in effect.

The argument seems to us unpersuasive even on the face of the statutory language. It depends in the first instance upon freighting the phrase "the whole or any part," obviously intended to give the Commission power to grant less than the whole of an application, with a load of negative meaning which nothing in the legislative history indicates that it was to bear. Even without the illumination of the purpose of the Act, it could be argued with equal force that all that was meant was that the certificate to be granted be one sufficient to authorize the specific "sale" proposed; which an unlimited certificate clearly is, in any case. But apart from this, petitioner's contention depends on the assumption that the provisions relied upon speak only in terms of the specific "sale" contemplated by the parties and not in terms of a "service" in the movement of gas in interstate commerce, of which "service" the initial "sale" is the commencement. For under § 7 (e) the Commission is authorized to issue a certificate authorizing the "service" covered by the appli-

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power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.". Added by the Act of February 7, 1942, 56 Stat. 84, 15 U. S. C. § 717f (e).

cation, as well as a "sale"; and since § 7 (c),[15] which details the acts for which a certificate is a prerequisite, sets forth no specific antecedent for the "service" to which § 7 (c) refers, it might well be thought that one who "engages in the transportation or sale of natural gas," which § 7 (c) does refer to, is performing a "service" within the meaning of § 7 (c). Certainly there is no more likely antecedent

[15] "No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

"In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly. *Provided, however*, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest." Added by the Act of February 7, 1942, 56 Stat. 83, 15 U. S. C. § 717f (c).

in § 7 (c). The structure of § 4 (e) presents the same feature,[9] and that of the abandonment provisions of § 7 (b) themselves[10] looks the same way.

Furthermore, within § 7 (c) itself, there is found the further requirement to which petitioner itself points—that with respect to an application for a certificate of any nature, a two-part finding must be made: that the applicant is willing and able "to do the acts and perform the service proposed." Thus, it is evident that all the matters for which a certificate is required—the construction of facilities or their extension, as well as the making of jurisdictional sales—must be justified in terms of a "service" to which they relate. Accordingly, § 7 (c) itself gives positive indication that the "service" which the Commission's certificate may authorize is something quite apart from simply the specific sales which § 7 (c) forbids without a certificate sufficient to authorize them. To be sure, § 7 (c) requires that the applicant be found willing to perform the "service" in question; but surely such willingness can be inferred from its willingness to enter into a long-term sales contract. To say that the finding cannot be made in view of the applicant's declared desire to stop and have a look in 20 years as to its continued desire to be subject to regulation, and that this is a limit on its willingness to perform the service that the certificates must respect, is to make effective regulation turn on the desire of the regulated enterprise to be sub-

[9] Not only does § 4 (e), note 10, *supra*, contain a reference to "services" in a context where the antecedent must be "transportation or sale," but it recognizes that a "contract" may "affect or relate to" such services.

[10] It will be noted that § 7 (b) does not refer to the abandonment of the continuation of sales, but rather to the abandonment of "services." See note 8, *supra*. Accordingly if petitioner was correct that its contract did not involve a "service," it would be difficult to see the applicability of the abandonment provision even during the term of the contract, when petitioner concedes it is applicable.

ject to it.[18] The willingness to make the proposed "sale" thus must imply willingness to perform the "service" which it represents. Thus even as a verbal argument, petitioner's contentions lack persuasiveness.

Second. Once we pass beyond parsing the Act to a consideration of its purpose, and of the practice under it, the construction we have given it becomes inescapable. We have outlined the serious consequences for the regulatory scheme that acceptance of the petitioner's argument would entail. These consequences cannot readily be averted by other means suggested by the Act.

It is urged that if it is in the public interest to award only an unlimited certificate, the Commission might attain this end by refusing all applications for a limited one, intimating that an unlimited application would be favorably regarded. But the action of the Commission in refusing the certificate as originally applied for would be subject to judicial review; and once it were held that the Commission had no authority to award a certificate of longer duration than that prayed for, such an indirect method of attaining the same end might well meet judicial condemnation as arbitrary. There is also some suggestion that the Commission might use its power, under § 7 (e), of attaching to the certificate "such reasonable terms and conditions as the public convenience and necessity may require," to attach the "condition" that the certificate be permanent. But again, once want of power to do this directly were established, the existence of power to achieve the same end indirectly through the conditioning power might well be doubted; and the acceptance of a certificate for a longer duration than requested might not be said properly to be a "term or condition" of a limited

[18] In fact, as to this contention, the examiner summarized the effect of petitioner's position by saying that it amounted to a declaration that petitioner "would prefer not to be subject to regulation." 19 F. P. C. 618, 635.

one at all.[19] We think the Commission's power to protect the public interest under § 7 (e) need not be restricted to these indirect and dubious methods.

The Commission's practice supports its authority here in the terms of § 7 (e). It has long drawn a distinction between the underlying service to the public a natural gas company performs and the specific manifestation—the contractual relationship—which that service takes at a given moment. For example, an independent producer may file as its rate schedule its contract of sale with a pipeline company. That contract may provide in explicit terms for an adjustment of rates at a future time—even one foreordained in a precise amount. Yet when the adjustment is made pursuant to the contract, the adjustment is subject, as a "change" in rates, to the procedures of §§ 4 (d) and 4 (e)—however explicit the upward adjustment was in the contract from the start. Cf. *Texas Gas Transmission Corp.* v. *Shell Oil Co.*, p. —, *ante*. This position of the Power Commission is evidence that the service in which the producer engages is distinct from the contract which regulates his relationship with the transmission company in performing the service. And it has been upheld in every Court of Appeals case on the question. *Episcopal Theological Seminary* v. *Federal Power Comm'n*, 269 F. 2d 228; *Bel Oil Corp.* v. *Federal Power Comm'n*, 255 F. 2d 548, and companion cases; *Con-*

[19] One Court of Appeals has described the granting of a permanent certificate upon an application for a limited one as a conditional certificate, but its discussion would appear to negate the inference that it meant a condition in the ordinary sense of one attached by authority of the last sentence of § 7 (e). See *Sunray Mid-Continent Oil Co.* v. *Federal Power Comm'n*, 239 F. 2d 97, 99, n. 3, reversed on other grounds, 353 U. S. 944. The Commission's order here rested alternatively on the conditioning power, and on the ground we have supported above. 19 F. P. C., at 620. Once the power to grant a permanent certificate under the general provisions of § 7 (e) is established, resort to the conditioning power is superfluous.

tinental Oil Co. v. *Federal Power Comm'n*, 236 F. 2d 839; *Cities Service Gas Producing Co.* v. *Federal Power Comm'n*, 233 F. 2d 726; *Mississippi River Fuel Corp.* v. *Federal Power Comm'n*, 121 F. 2d 159. See *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Div.*, 358 U. S. 103, 110. If the Act does not contemplate that in a seller's contract there may inhere the power, of the contract's own accord, to effect a rate change at a future date unchecked by the regulatory scheme, it is hard to believe that it contemplated that contracts would of necessity have the effect of providing for a discontinuance of service, without further leave of the Commission.

Further, the Power Commission has from an early date taken the view that there is a continuing obligation to perform "service" imposed by the Act which outlasts the term of a seller's original contract of sale. As early as 1942 it held that an abandonment of service after the expiry of such a contract had to have Commission approval under § 7 (b). *United Gas Pipe Line Co.*, 3 F. P. C. 3, 9. This ruling was made by Commissioners who had been in office during the passage of the Act.[20] It was not a fundamental ruling on a broad question of jurisdiction as to which a court might enjoy a wider latitude of review. See *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, 678. It was rather an early implementation and application of a detail of the statutory scheme by the Commission in a regulatory setting before it. The ruling has been followed, see *Panhandle Eastern Pipe Line Co.*, 11 F. P. C. 167, 172, and we think this contemporaneous and consistent construction, pointing again to a distinction between the underlying "service" to the public and the contractual means by which it is implemented, is to be afforded weight in the construction we make.

[20] Commissioners Manly, Draper, Scott, and Seavey, who signed the decision, were all on the Commission at the time of the passage of the 1938 Act.

Third. But against these considerations, it is urged that *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U. S. 332, establishes dominant factors which impel one to the construction petitioner would put on the Act. Petitioner claims that *Mobile* establishes a principle that the Act (unlike many other regulatory schemes)[21] in general preserves the integrity of private contracts, and that the judgment below is in conflict with that principle.

The petitioner states accurately enough the principle that *Mobile* establishes. See 350 U. S., at 338, 344. But the conclusion petitioner asserts does not follow. In *Mobile*, this Court held that where a seller of gas had entered into a contract for the sale, it could not, by virtue of the provision in § 4 for rate changes, file an increase in rates that violated the terms of the contract. This was because the scheme of the Act was one which built the regulatory system on a foundation of private contracts. It was held in the *Memphis* case, *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Div.*, *supra*, that the corollary of *Mobile* was that where the contract left the seller free to act, he could act unilaterally under § 4.

It is apparent that the Commission's order in no way violates the integrity of petitioner's contract with United. During its term, both parties are bound by it to the same extent as any members of this regulated industry. When it expires, petitioner, to be sure, will be under an obligation to continue to deliver gas to United on the latter's request unless it can justify an abandonment before the Commission; but we do not see how this in any way disturbs the integrity of the contract during its term. The obligation that petitioner will be under after the contract term will not be one imposed by contract but by the Act. It will be free then, as it was not free during the contract

[21] See, *e. g.*, *Armour Packing Co.* v. *United States*, 209 U. S. 56, 81-82.

term under the contract here in question, to make rate changes under § 4 without United's consent. It is said that petitioner will be in a position of inequality, because it must supply gas then to United without a corresponding obligation on United to take it. But United, subject to the Act in its sales to local distributors, has its obligations too; and if in fulfilling them it desires to have a continuing supply of gas with the stability of price protection which a contract furnishes under *Mobile*, it may be discovered that each side has its bargaining strength. In any event, we do not see how the prospect of this situation after the term of petitioner's contract in any way impairs the integrity of any contract. *Mobile* is thus simply beside the point.

The short of the matter is that *Mobile* recognized that there were two sources of price and supply stability inherent in the regulatory system established by the Natural Gas Act—the provisions of private contracts and the public regulatory power. See 350 U. S., at 344. Petitioner now urges an application of that decision that could make private contracts the only stabilizing factor under the Act. Not only does this reading have nothing to do with the integrity of private contracts which *Mobile* underwrote, but it makes a severe incursion into the sources of that stability of natural-gas prices and supply to which that decision gave confirmation. Our consideration of this, as well as the rest of petitioner's arguments, leads us to reiterate as our holding the clear implication of what we recently said in *Catco:* An initial application of an independent producer, to make movements of natural gas in interstate commerce, leads to a certificate of public convenience and necessity under which the Commission controls the basis on which "gas may be initially dedicated to interstate use. Moreover, once so dedicated there can be no withdrawal of that supply from continued interstate movement without Commission approval.

The gas operator, although to this extent a captive subject to the jurisdiction of the Commission, is not without remedy to protect himself." 360 U. S., at 389. That remedy he has, as *Catco* said, in the "change" power under § 4 (d) when his contract has expired or where his contract permits its use during its term. Under a similar Act, this Court has held to the same effect as we hold today. *Pennsylvania Water & Power Co.* v. *Federal Power Comm'n*, 343 U. S. 414, 423–424.

II.

Once the power of the Commission to issue the certificate without time limitation is established, the other objections of the petitioner fall readily. It is contended that the Commission's order, by requiring the petitioner to supply gas beyond the term of its contract, may, by requiring petitioner to produce more gas than it has contemplated, offend the provision of § 1 (b) of the Act that the Act does not apply "to the production or gathering of natural gas." The point was not raised before the Commission, and accordingly is not for our consideration here;[22] and we might say in any event that the point is not for evaluation in this certification proceeding, but rather on the specific facts presented in the context of an abandonment application by petitioner under § 7 (b), after the expiration of its contract, when and if it desires to make one. We intimate no view as to its merit.[23]

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[22] "No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do." Section 19 (b), 52 Stat. 831, as amended, 15 U. S. C. § 717r (b). Petitioner did not comply with this provision.

[23] Petitioner makes an argument based on the limitations found in a proviso to § 7 (a) of the Act, the Commission's authority to require the extension of transportation facilities and the sale of

Other objections seem primarily directed to the point that the Commission imposed the burden of proof on the petitioner to show that the certificate should be limited, in the public interest, rather than itself taking on the burden of supporting its issuance of an unlimited certificate. There is no contention that the Commission was again indulging in the erroneous notion that it had no power to issue a limited certificate. Cf. *Sunray Mid-Continent Oil Co.* v. *Federal Power Comm'n*, 239 F. 2d 97, reversed on other grounds, 353 U. S. 944. This procedural formulation seems to us well within the Commission's discretion as an implementation of the Act's protective provisions which we have discussed. And, though much urged by petitioner, the fact that the Commission has certificated pipeline operations despite their showing of gas resources of a shorter duration than petitioner's contract term is not inconsistent with the Commission's approach here.[24] From the fact that the Commission has issued certificates in the presence of what may prove to be physical limitations on the service to be rendered under them,[25] it does not follow that the Commission cannot take care lest these physical problems in the continuation

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gas to local distributors. 52 Stat. 824, 15 U. S. C. § 717f (a). But the Commission's order in no way relied on § 7 (a), and accordingly this argument of petitioner must be rejected.

[24] Primary reliance is put on *Transwestern Pipeline Co.*, 22 F. P. C. 391, 395-396, and *Trunkline Gas Co.*, 21 F. P. C. 704, 709, where the Commission certificated pipeline companies despite the fact that their presently established gas reserves were shown to have a deliverability life of about 13 years.

[25] It might be observed that in these cases the Commission issued certificates without time limitations. Thus if the companies, failing to find new sources of gas supply, desired to abandon service because of a depletion of supply, they would have to make proof thereof before the Commission, under § 7 (b). The Commission thus, even though there may be physical problems beyond its control, kept legal control over the continuation of service by the applicants.

of supply become further complicated by the legal certificate term limitations for which the petitioner contends.

Finally it is suggested that for various reasons which petitioner claims to be related to the public interest, it would be more advantageous if gas producers were given a free hand, after the completion of each contract, to determine for themselves whether they should continue to serve the interstate market. These considerations were not urged before the Commission, and hence we are not called upon to decide whether they would compel a different approach by the Commission to the question of time limitations in certificates, or even whether, in the light of the Act's provisions—particularly the policy expressed in § 7 (b)—it would be proper for it so to rely on them. There is no contention made that petitioner demonstrated any specific circumstances in its own case indicating that, despite the Commission's general policy, the public convenience and necessity warranted a limited certificate for it.

Affirmed.